IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-174

MEAD JOHNSON & COMPANY, HAROLD SCHWARTZ, CAROLINA SUBURBAN CO., INC., and JOHN DOE and/or JOHN DOE, INC. (the defendant being the distributor of the product herein to Carolina Suburban Co., Inc.),

Petitioners,

vs.

FLORENCE L. GOODMAN and ROBERT J. GOODMAN, individually and as Executor of the Estate of FLORENCE L. GOODMAN, deceased,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner, Mead Johnson & Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals originally entered on April 2, 1976, and petition for rehearing denied May 10, 1976.

Opinions Below

The opinions of the Court of Appeals are attached hereto as part of the Appendix and are reported at 534 F 2d. 566 (3 Cir. 1976) and the opinion of the United States District Court for the District of New Jersey is reported in 338 F. Supp. 1070 (D.C. N.J. 1974).

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered April 2, 1976 and the motion for rehearing was denied May 10, 1976. The jurisdiction of this court is invoked under 28 USCA 1254(1).

Questions Presented

Whether or not, in a diversity case, a federal court must submit to a jury an equitable claim of "late discovery" of a cause of action, which under state law must be decided by the trial judge as a threshold matter, without a jury?

Whether or not, in a diversity case, where there is no state decision directly in point and the state courts have held generally that defenses to the principal claim also apply to a derivative *per quod* claim, a federal court may hold that a *per quod* claim may not be barred because of "late discovery" even though the principal claim may be barred?

Statute Involved

N.J.S.A. 2A:14-2 provides:

> "Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued."

Statement of the Case

This action was commenced by the filing of a complaint on February 25, 1971. The action lacked jurisdiction originally because the plaintiff and the defendants other than Mead Johnson & Company were citizens of New Jersey. On motions directed to the jurisdiction, the District Court granted motions of dismissal as to the other defendants and granted plaintiff's application for leave to amend the complaint to meet the jurisdictional requirements. These rulings are not in issue in this appeal.

The pertinent facts are contained in defendant's demands for admissions which were never denied. In the first set, filed February 25, 1972 it was admitted that the plaintiff alleged that the first package of "Oracon" she used was a one-month supply in April of 1967, and in June 1967 she used about a half of a one-month supply from a second package of "Oracon".

Between June 21, 1967 and July 4, 1967, the plaintiff was hospitalized at St. Barnabas Medical Center with a diagnosis of "acute thrombophlebitis left leg, and on or about June 15, 1967, the plaintiff was advised to discontinue using 'Oracon' " when she reported swelling of her leg.

While the plaintiff was in the hospital in 1967, she was told by Dr. Goldbas not to take "Oracon" and that there had been cases of correlation between taking the pill and phlebitis.

On June 21, 1967 Dr. Goldbas examined the plaintiff, Florence Goodman, at St. Barnabas Medical Center and noted that there were "no masses" in the breasts. In December 1968, the plaintiff, Florence Goodman, first noticed a lump in the right breast which started enlarging noticeably, and the plaintiff consulted Dr. Goldbas about the lump in her breast.

Dr. Goldbas referred the plaintiff, Florence Goodman, to a doctor, a surgeon with an office in Millburn, who recommended surgery to plaintiff for the condition of her breasts between December 1968 and February 24, 1969. The plaintiff, Florence Goodman, also consulted another surgeon, Dr. Skeets who recommended surgery for the conditions in plaintiff's breasts prior to February 24, 1969.

Between February 25, 1969 and March 17, 1969, the plaintiff was hospitalized at St. Barnabas Medical Center with a diagnosis of "Carcinoma of the right breast; fibrocyatic disease of the left breast."

The complaint in this action was filed on February 25, 1971, and the defendant, Mead Johnson & Co. was served March 2, 1971. More than two years elapsed between the time the plaintiff, Florence Goodman, alleges she last took "Oracon" and the date this action was commenced. More than two years elapsed between the time the conditions which the plaintiff, Florence Goodman, claims to have resulted from the use of "Oracon" first manifested themselves and the date this action was commenced. The first notice of claim received by the defendant, Mead Johnson & Co., and of any allegation by the plaintiffs, was when it received the summons and complaint in this action.

The plaintiff consulted Dr. John Skeets prior to February 25, 1969 when she was admitted to St. Barnabas Hospital and told him that she had been on the pill when she developed thrombophlebitis in 1967. The plaintiff also told Dr. Nathan Dorman in September, 1968 that she had been on the pill when she developed thrombophlebitis in 1967, and she also told Dr. Howard Goldbas in June, 1968 that she had been on the pill when she developed thrombophlebitis in 1967. In short, the plaintiff knew in June, 1967 that there might be a relationship between her thrombophlebitis and her taking of "Oracon" and she was aware that she had a lump in her right breast in December, 1968.

"Oracon" is a prescription drug and plaintiff obtained a prescription for it from Dr. Harold Schwartz on or about April 4, 1967.

Plaintiff's knowledge that she might have had a cause of action was further supported by the fact that she consulted counsel with reference to the claim before June 11, 1968. Counsel apparently ordered the hospital records on June 11, 1968. On or about November 18, 1969, Mrs. Goodman wrote to Mr. Morris a letter which stated in part, "Enclosed is a letter from Mr. Krin, an advertisement for a book that sounds as if it supports my view of 'the pill' . . ."

The contents of deposition of Dr. Schwartz wasn't argued before Judge Stern. The plaintiff's attorney didn't take this deposition until November 22, 1974 after the oral argument. The doctor was vague about many aspects of the case involving recollection of events many years before. This alone illustrates the inherent prejudice in trying to establish the truth many years after an event.

This testimony confirmed what already appears in the record, namely, that Dr. Schwartz did not prescribe "Oracon" as an oral contraceptive but because it was a product with a good estrogen and protestin effect. He used these drugs to treat menopausal complaints. He knew that any pill with estrogen was contra-indicated in the face of thrombophlebitis. He didn't know whether Mead Johnson & Co. recommended "Oracon" for menopausal complaints. The use of estrogen and protestin in treating menopausal complaints was in accord with good medical practice. It is clear from depositions of Mrs. Goodman and Dr. Schwartz that she took the pill for reasons other than contraception on prescription from Dr. Schwartz and she stopped taking them on direction from the doctor's office when she showed signs of thrombophlebitis.

Judge Stern set the limitations issue down for a hearing. He wrote to both counsel. On the date set, at the hearing, plaintiff's attorney stated he didn't want to introduce any evidence. He could have presented any testimony at the hearing. The Court made clear that both sides had every opportunity to perfect the record. The Court gave both counsel an opportunity to file briefs on the issues raised and rendered a written opinion. One comment, however, made by the Court during the argument is significant:

> "The Court: I reach no conclusion. I don't know. It may well be that no matter what Rule I apply I come out in your direction. If I apply the *Lopez* test I certainly come out in your direction because I'll tell you right now if I have to resolve the factual controversy it seems to me clear that a State Court sitting in the identical case here would dismiss this case as barred.

> The only question in my mind is whether as a Federal Judge I am permitted to do what a State Court Judge would do in this case, would be required to do in this case to do in this case, and if I'm not, whether, then, under Rule 56 there exists any factual controversy at all."

After the Court had the benefit of briefs, a written opinion was rendered and the Court stated (40a):

> "Plaintiff has not demonstrated that she is entitled to the protection of the discovery rule. Indeed, the defendant has firmly established, via the deposition of the decedent, that after she discovered her injury and its correlation with the defendant's allegedly defective drug, she brought no suit for three and one-half years, twenty months after the statute had run."

The Court of Appeals reversed the judgment for defendant. The majority held that there was at least a question of fact whether the claim based on the allegation of thrombophlebitis resulting from the use of "Oracon" was a different cause of action than the alleged claim of "cancer" resulting from the use of "Oracon" so that the rule about not splitting a cause of action would not apply.

The court held that even though the husband's *per quod* claim was a "derivative" claim, the New Jersey state courts would hold that a separate and distinct "discovery" date would apply to him and the assumption of the district court that the disposition of the main claim governed the defense to the husband's claim was wrong.

The Court of Appeals held that the filing of the wrongful death claim in an amended complaint should have been

permitted by the trial judge since the denial was premised on the decision by the trial judge that the plaintiff's claim was time barred at the time of her death. This premise was reversed on appeal.

The court further held that it was improper for the District Court to decide the "late discovery" exception to the defense of the statute of limitations in accordance with the state court decisions which direct the trial judge to consider such exceptions on equitable grounds and should have instead submitted them to a jury for consideration with the other issues in the case.

The dissent in the Court of Appeals agreed in part with the majority and dissented in part. The disagreement was on the question of whether in a diversity case, the federal court should have followed state law to achieve the result sought in a carefully developed equitable procedure. Judge Rosenn stated he would have affirmed the judgment of the District Court as to the thrombophlebitis claim of Mrs. Goodman, since he would have accepted the factual findings of the district judge under the "clearly erroneous" standard of F.R.C.P. 52 (a).

Petitioner seeks a review of the decision of the Court of Appeals.

Reason for Granting the Writ

The division of opinion in the Court of Appeals demonstrates that an important question of constitutional law and federal practice applying state law in diversity cases is involved in this petition for certiorari. The majority of the Court of Appeals has significantly modified the rule of reference normally followed in a diversity case. The effect will be to encourage forum shopping.

This matter should be reviewed and settled by this court. In addition, the Court of Appeals has interpreted state law in a manner not consistent with such state law.

State law established a balanced and interwoven doctrine and procedure for a threshold inquiry by the trial judge which might permit a plaintiff to sue in certain circumstances even though the normal limitations period expired. *Lopez* v. *Swyer* 62 N.J. 267, 300 A2d 563 (1973). The majority in the Court of Appeals converted this threshold inquiry into a jury question on the ground that federal practice requires this procedure.

In his dissenting opinion Judge Rosenn cogently delineated the important constitutional issue raised by the opinions below. He stated (20a):

> "The majority has added another chapter to the ongoing saga of federal courts' efforts to reconcile the command of *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938), with the purposes of federal rules and policies. The majority concludes that *Byrd* v. *Blue Ridge Rural Electric Coop., Inc.,* 356 U.S. 525 (1958), requires that the New Jersey practice of allocating to the court the decision as to when a cause of action is 'discovered' for the purpose of applying the statute of limitations, must yield, in a federal diversity action, to the federal policy favoring jury decisions of disputed issues of fact. I dissent from that conclusion because I believe that the majority has misconstrued the New Jersey Supreme Court's decision in *Lopez* v. *Swyer,* 62 N.J. 267, 300 A.2d 563 (1973). My difference on that point leads me to some disagreement with the majority on the disposition of the claims presented.

• • •

> Thus, the application of New Jersey's discovery rule requires a consideration and balancing of a complex of factors. The balancing envisioned by *Lopez,* is a unitary process not readily divided into 'factual' and 'equitable' components. As I read *Lopez,* the allocation of this decision to the trial judge is 'intended to be bound up with the . . . rights and obligations of the parties' under state law, *Byrd, supra,* 356 U.S. at 536, and the federal courts arethus obligated to follow the state practice."

Judge Rosenn in his dissenting opinion pointed out:

1) The cases of *Byrd* v. *Blue Ridge Rural Electric Cooperative Inc., supra* and *Magenau* v. *Aetna Freight Lines Inc.* 360 U.S. 273, 79 S. Ct. 1184, 3 L. Ed.2d. 1224 (1959) were distinguishable as cases where the state practice of having factual finding as to an "employee relationship" defense asserted in a diversity action, had "no reason" for referring the issue to a judge, rather than to the jury with the other issues in the case.

2) In contrast the *Lopez* v. *Swyer, supra* doctrine represents a carefully balanced accommodation of two conflicting policies, i.e. the harshness of strict adherence to a statute of limitations and a weighing of equitable considerations which may justify a delay. The *Lopez* opinion makes clear that judicial determination of the conflicting elements set forth in the opinion should be done by the trial judge as an integral part of the state law.

3) Honoring the *Lopez* rule in its fullest will avoid forum shopping. The majority opinion not only undermines the basic philosophy of *Erie Railroad Co.* v. *Tomkins, supra* but increases the burden of diversity cases in federal courts.

In *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.,* 356 U.S. 525, 2 LEd. 2d 953, 78 S.Ct. 893, reh.den.357 U.S. 933, 2 L.Ed. 2d 1375, 78 S.Ct. 1366 (1958) cited by the majority in the Court of Appeals, the court was confronted with a state decision in a diversity case that the issue of an employer's immunity to a negligence action should be decided by the court and not by a jury. The Supreme Court rejected this practice by a divided court. Mr. Justice Brennan speaking for the majority, stated as to this rule, "We find nothing to suggest that this rule was announced as an integral part of the special relationship created by the statute." (page 536) Therefore, one of the important elements of this decision was the lack of any obvious compelling reason for treating this particular issue as an exclusive non-jury issue. Any reading of the *Lopez* case and the other cases decided subsequently demonstrates that the Supreme Court of New Jersey did not regard the requirement of a "threshold" decision by the trial judge as anything other than an "integral part" of the *Lopez* "discovery" rule. New Jersey courts also have a mandate to preserve trial by jury in civil cases. See *Colacurcio Contracting Corp.* v. *Weiss,* 20 N.J. 258, 119 A2d 449 (1955).

The majority has extended the application of *Byrd* v. *Blue Ridge Rural Electric Coop., Inc., supra,* beyond its rationale. It has, in effect, created a disparity between what was intended when the state court created a carefully balanced rule of equity to ameliorate a rule of law that could otherwise be unduly harsh and what the practice would be in federal court. By submitting the factors which are to be balanced to a jury for consideration, the very balancing is substantially destroyed.

The trial judge followed the New Jersey law which treats the limitations defense as a threshold inquiry in the circumstances where a late discovery of a cause of action is asserted. There is nothing inconsistent with federal law or practice in the procedure followed by the trial judge. The female plaintiff died after the case had been started. All that the plaintiff's attorney had to offer was the deposition of the deceased. A jury would not have had the advantage of anything more. The trial judge gave the attorney for the plaintiff every opportunity to produce evidence of any kind on the issue at a specially set hearing. The trial court found in fact that there was not a "late" discovery. Consequently, the further inquiries as to prejudice, etc., were not even relevant. The burden was on the plainttiff to establish the "late" discovery. It is interesting to note that nowhere in the opinion of the Court of Appeals is any date of "late" discovery even suggested.

N.J.S.A. 2A:14-2 is the statute of limitations provision applicable in this case. *Heavner* v. *Uniroyal Inc.* 63 N.J. 130, 305 A2d. 412 (1973). Both the majority and minority opinions below accept this basic premise. This provision sets forth a two year period to start suit from the date of accrual of a cause of action.

The "discovery" doctrine in New Jersey originates in the case of *Lopez* v. *Swyer, supra,* where the court expanded the basis of relief from the bar of the statute of limitations from the cases involving "concealment" by a defendant to broader grounds of "delayed" discovery. Justice Mountain commented on the equitable aspect of the discovery doctrine in footnote 2 of his opinion:

> "2. We have in New Jersey a long history of instances where equity has interposed to bar the statute of limitations in actions at law where some conduct on the part of the defendant in the law action has rendered it inequitable that he be allowed to avail himself of this defense."

He also described the discovery rule as "essentially a rule of equity." He justified the rule as an "equitable doctrine" and "as a means of mitigating the often harsh and unjust results which flow from a rigid and automatic adherence to a strict rule of law." He reviewed the equities when there is a late discovery of a cause of action. First of all the plaintiff must in fact prove there was late discovery. Then the court must reconcile the various factors to be considered if late discovery is proved. He stated at page 567 of Atlantic:

> ". . . So in each case the equitable claims of opposing parties must be identified, evaluated and weighed. Where, as is often the case, they cannot be wholly reconciled, a just accommodation must be reached. We think this can better be done by a judge than by a jury. In the first place, the question as to the application of the statute of limitations *is ordinarily a legal matter* and as such is traditionally within the province of the court. *Furthermore, submission of the issue to a jury is in every sense awkward.* It is true that the time of discovery is a question of fact, and so could be left to a jury. But, as we have indicated, the matter does not rest there. *It is not every belated discovery that will justify an application of the rule lifting the bar of the limitations statute.* The interplay of the conflicting interests of the competing parties must be considered. *The decision requires more than a simple factual determination;*

it should be made by a judge and by a judge conscious of the equitable nature of the issue before him." (emphasis ours)

Justice Mountain stated that the determination should be made by the judge at a preliminary hearing out of the presence of the jury. It may be based on affidavits and depositions where credibility is not an issue. In an appropriate case the court has the option to permit the case to go to trial, reserving and ruling on the limitations defense at the end of the plaintiff's case or after all the proof is in. In such case he cautioned in footnote 3:

". . . Where this procedure is followed, *the trial court must be careful to excuse the jury when any evidence is to be received relevant solely to the limitations point, if the reception of such evidence in the jury's presence might be in any way prejudicial to the opposite party.*" (emphasis ours)

This footnote illustrates the concern of the state court for the inherent problem of possible prejudice arising from the introduction of the "know or should have known" evidence before a jury. This is more than a mere concern for convenience and efficiency as suggested by the Court of Appeals.

The inquiry as to what a plaintiff knew or should have known often deals with what the plaintiff read or was told by other persons. It involves comments or impressions which may have nothing to do with the cause of action being asserted but which relate to the state of the plaintiff's knowledge after the event. Such statements can easily introduce matters which would be highly prejudicial.

Normally a defendant denies liability in a negligence action. Where the defendant has to argue that the plaintiff knew or should have known the plaintiff had a cause of action to dispute a claim of late discovery, the defendant runs the risk of undermining his own defense. A judge can easily understand the distinction between the two positions. A jury may not.

A fair reading of the opinion of Judge Mountain and subsequent decisions demonstrates that more than a mere procedural preference is involved.

The *Lopez* case, *supra,* has been amplified by the recent New Jersey Supreme Court decisions in *Moran* v. *Napolitano,* N.J. A.2d (1976); and *Fox* v. *Passaic General Hospital,* N.J. , A.2d. (1976). Both were 4-3 decisions.

The majority in these cases held that a plaintiff has two years from the date of discovery to start suit. The minority felt that the rule should permit only a "reasonable time" where the limitation period would otherwise be extinguished. The "equitable" nature of the remedy was emphasized by both the majority and the minority opinions. The majority opinion in *Fox, supra,* held also:

"As already intimated, however, the general rule we here declare must be administered in such manner as not unduly to affect a defendant's right to equitable treatment. *The discovery rule possesses the inherent capacity for prejudice to a defendant* since the principle of repose inherent in the statute of limitations is necessarily diluted when an action is instituted beyond the statutory period after the defendant's actionable conduct. See *Lopez* v. *Swyer, supra,* 62 N.J. at 274. We therefore are of the view, and hold, that if a defendant can es-

tablish (a) that the lapse of time between the expiration of two years after the actionable event and the date of institution of the suit 'peculiarly or unusually prejudiced the defendant,' *id.* at 276; and (b) that there was a reasonable time for plaintiff to institute his action between discovery of the cause of action and expiration of said two years after the actionable event, the cause of action may be dismissed on limitations grounds. . . ." (emphasis ours)

In footnotes to the opinion the court stated further:

"1. However, the statement in the text does not alter the rule of *Lopez* v. *Swyer,* supra, 62 N.J. at 276, to the extent that that case holds that a plaintiff who contends his discovery of his cause of action postdated defendant's actionable conduct has the burden of proof as to the date of such discovery.

2. By definition, *the prejudice rule* we here announce *is applicable only in cases where plaintiff discovers his cause of action within two years of the actionable conduct of defendant.* As to the effect of prejudice to defendant where the cause of action is discovered later, we leave the matter, subject to what we said in *Lopez,* 62 N.J. at 276, for further consideration in a case presenting that precise issue." (emphasis ours)

The *Fox* case, *supra,* carries *Lopez, supra,* one step further. However, to get the benefit of either *Fox, supra,* or *Lopez, supra,* the plaintiff must first prove "late" discovery, then he has two years from the date of such "late" discovery to start suit. Even if the plaintiff proves

late discovery, the defendant may nevertheless show that the delay between the end of the normal two year period and the date suit was instituted caused unusual prejudice to the defendant, and the plaintiff had had a reasonable time within this period to start suit and didn't do this. In such case, the court would apply the bar of the statute, even though suit was started within two years after late discovery.

If all of this is presented to a jury, would a legal expert be required to give testimony on what would be "a reasonable time" to start a suit? In *Fox, supra,* the court left open the question of burden of proof on the issue of "prejudice" where the cause of action is alleged to have been discovered after the two year period. In this case, with the different possible causes of action suggested by the Court of Appeals, the problem of burden of proof could become quite complex and incomprehensible to a jury.

Determining a *Lopez* defense under New Jersey law is analogous to finding jurisdictional facts. In *Gilbert* v. *David,* 235 U.S. 561, 35 S. Ct. 164, 59 L. Ed. 360 (1915) the court held that the judge may hear and determine disputed issues of jurisdictional fact without submitting them to a jury for determination. See also *Appelt* v. *Whitty,* 286 F. 2d. 135 (7 Cir. 1961).

There is nothing inconsistent with federal practice in the requirement that the equitable issues raised by the excuse of delayed discovery be decided by a judge in a preliminary hearing. F.R.C.P., Rule 42 (b) permits separate trials of claims or issues "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." It is not unusual for a federal court to submit some issues to a

jury and decide other issues itself. *Cf. United States* v. *Yellow Cab Co.,* 340 U.S. 543, 71 S. Ct. 399, 95 L. Ed. 523 (1951); *Ross* v. *Bernhard,* 396 U.S. 531, 90 S. Ct. 733, 24 L. Ed. 2d. 729 (1970); *Beacon Theatres Inc.* v. *Westover,* 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed. 2d. 988 (1959).

While the federal courts have great respect for the preservation of the jury trial, it is not necessary to cloak everything with the jury trial mantle. The guarantee of the Seventh Amendment doesn't extend beyond the traditional right to a jury trial on issues regarded as jury issues, before a traditional jury panel. *Cf. Colgrove* v. *Battin,* 413 U.S. 149, 93 S. Ct. 2448, 37 L. Ed. 2d. 522 (1973) on the size of juries; *United States* v. *Matlock,* 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d. 242 (1974) dealing with a suppression hearing on evidence and F.R. E., Rule 104.1.

In connection with the extent to which the federal court in a diversity case would look to local law in applying a state statute of limitations, the case of *Ragan* v. *Merchants Transfer & Warehouse Co.,* 337 U.S. 530, 69 S. Ct. 1233, 93 L. Ed. 1520 (1949) held that service of the summons as required by state law and not the filing of a complaint as set forth in the federal rules determined the date the statute stopped running. See also *Guaranty Trust Co.* v. *York,* 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945). *Cf. Richards* v. *United States,* 369 U.S. 1, 82 S. Ct. 585, 7 L. Ed. 2d. 492 (1962). See also F.R.E., Rule 302 referring to state presumptions in cases applying state law.

The court below fashioned a new rule of law for New Jersey when it held that the husband's separate *per quod* claim was governed by a separate "discovery" excuse.

The majority opinion concedes that there is no specific New Jersey authority for the application it made of the "discovery" rule to a *per quod* claim. It pays for a spouse to be indifferent or ignorant under this rule. Many reported cases involving husbands and wives assume that the spouse's rights are no better or worse than the main claim in this regard. See *Moran* v. *Napolitano, supra; Lopez* v. *Swyer, supra; Aruta* v. *Keller,* 134 N.J. Super. 522, 342 A2d. 231 (App. Div. 1975); *Rothman* v. *Silber,* 90 N.J. Super. 22, 216 A2d. (18 App. Div. 1966) and comments in *Tackling* v. *Chrysler Corp.,* 77 N.J. Super. 12, 185 A2d. 238 (Law Div. 1962); *Ekalo* v. *Constructive Service Corp. of America,* 46 N.J. 82, 215 A2d. 1 (1965); *Scott* v. *Richstein,* 129 N.J. Super. 516, 324 A2d. 106 (Law Div. 1974).

In an analogous situation involving infants the court refused to apply the infancy exception to a parent's derivative claim only to have the legislature correct the effect of the decision promptly, adding the tolling provision to the parent's claim also. *Cf. Knutsen* v. *Brown,* 96 N.J. Super. 229, 232 A2d. 833 (App. Div. 1967); *Rost* v. *Board of Education of Fair Lawn,* 137 N.J. Super. 79, 347 A.2d 811 (App. Div. 1975). The strong policy which makes the actions of the spouse in the primary claim controlling, is reflected in the rule that contributory negligence of the one injured is a defense to an action by the party with a derivative claim. See *Patusco* v. *Prince Macaroni, Inc.,* 50 N.J. 365, 235 A2d. 465 (1967). In the latter case the court made clear that the husband's alleged claim for medical expenses "past and future" belong to the wife, and the question of who pays for these expenses and who collects for them is a matter for adjustment between them. (See page 469 of Atlantic, over-ruling *Kimpel* v. *Moon,* 113 N.J.L. 220, 174 A. 209 (Sup. Ct. 1934), also cited in footnote 19 of the majority opinion of the Court of Appeals.)

The district court applying the "discovery rule" to everything flowing from the alleged origi. ' tort made a proper determination in accordance with the New Jersey law set forth in *Lopez, supra.*

CONCLUSION

This case involves an important question of federal law in diversity cases. In such cases, it has always been an important consideration to minimize the differences in result which may occur when a case is tried in a federal court rather than a state court. The decision of the majority creates such a difference and destroys an important part of a carefully developed state law doctrine designed to equitably balance conflicting interests.

An object of the diversity rule of reference to State law is to avoid forum shopping and the resulting increase in federal cases. These considerations are as important as ever. Nothing in the intricate concepts of the *Lopez* rule is inconsistent with federal requirements. The *Lopez* rule has much to recommend it, since it results in saving time, effort and expense.

In addition, the Court of Appeals has erroneously interpreted state law so that it is possible for a party with a derivative *per quod* cause of action to claim "late discovery" where the main claim would have been barred by the statute of limitations.

The federal question dealing with the law applied in a diversity case, however, involves important considerations of law and policy and should be reviewed by this court.

For these and other reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[APPENDICES FOLLOW]

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

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FLORENCE L. GOODMAN and ROBERT J. GOODMAN, individually and as executor of the Estate of Florence L. Goodman, deceased,

v.

MEAD JOHNSON & CO., HAROLD SCHWARTZ, CAROLINA SUBURBAN CO., INC.

In the United States Court of Appeals, Third Circuit, No. 75-1333, Dated April 2, 1976. Appeal from the United States District Court for New Jersey, Reversed.

For the Appellant: William R. Morris, Esq., 744 Broad St., Newark, N.J. 07102.

For the Appellee: Bernard Chazen, Esq., P.O. Box 470, 10 Grand Avenue, Englewood N.J. 07631.

GIBBONS, C.J.: This is an appeal from an order in a diversity case granting defendant's motion for summary

judgment.[1] The original plaintiffs were Florence L. Goodman and her husband, Robert J. Goodman. While the action was pending Florence Goodman died and Robert Goodman, as executor of her estate, was substituted as the real party in interest pursuant to Rule 17(a), Fed. R. Civ. P. The defendant is Mead Johnson & Company, the manufacturer of the estrogen compound Oracon, which Florence Goodman used from April 4 through June 19, 1967 and which plaintiff alleges caused the injuries at issue in this case. The complaint was filed on February 25, 1971, more than three years and eight months after the last use of Oracon. The district court held that the New Jersey two year statute of limitations applicable to personal injuries. N.J.S.A. 2A:14-2, barred the various claims asserted in this case even taking into account that state's "Discovery Rule" exception.[2] Because there are genuine issues of material fact as to the date of discovery of the several claims against Mead Johnson which could not be resolved on a motion for summary judgment, we reverse.

I. Plaintiff's Claims

Originally the plaintiff's asserted claims for negligence and breach of implied warranty of fitness for intended use, claiming:

> (1) on behalf of Florence Goodman that use of Oracon caused thrombophlebitis;

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[1] The decision below is reported at 388 F.Supp. 1070 (D. N.J. 1974).

[2] *Id.* at 1073-75.

> (2) on behalf of Florence Goodman that use of Oracon caused carcinoma of the right breast resulting in a mastectomy;
>
> (3) on behalf of Robert Goodman, an action *per quod consortium amisit.*

After his wife's death on May 22, 1973, Robert Goodman, with the court's permission, filed an amended complaint in which he substituted himself, as executor of his wife's estate, as a plaintiff. However, in the amended complaint he also included a wrongful death claim under N.J.S.A. 2A:31-1 *et seq.*

Thus, besides the decedent's thrombophlebitis and cancer personal injury claims and Robert Goodman's *per quod* claim there was before the court a statutory wrongful death claim. The court's rulings on these claims are challenged on appeal.

II. The Wrongful Death Claim

The district court disposed of the wrongful death claim in a footnote as follows:

> This action was undertaken without leave of court or written consent of the adverse party as required by Rule 15 of the Federal Rules of Civil Procedure. Florence Goodman died May 22, 1973. (Plaintiff's Answer to Defendant's Supplementary Interrogatory No. 1(a)). Plaintiff had over one year after the death of Florence Goodman to allege these new causes of action. Now, on the eve of trial of this three year old case, after the completion of discovery, he attempts to inject new causes of ac-

> tion into this law suit through an improper use of the Federal Rules of Civil Procedure.
>
> To permit plaintiff to amend its complaint will undoubtedly cause the defendant to suffer prejudice in its defense of this suit. Discovery, now completed, will have to be re-instituted and the trial date of this aged case will be delayed again. . . . 388 F. Supp. at 1071-72n.2.[3]

This reasoning for relegating the plaintiff to a separate lawsuit to assert his wrongful death claim is completely unsatisfactory. Since the liability issues in this survivor's wrongful death action would be identical to those involved in the personal injury claims, the only possible "prejudice" to Mead Johnson if the amendment were permitted would be the necessity for further discovery regarding the sep-

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[3] The district court also suggested an alternate ground for refusing to consider plaintiff's wrongful death claim. Quoting from *Matlack, Inc.* v. *Hupp Corp.*, 57 F.R.D. 151, 163 (E.D. Pa. 1972), Judge Stern maintained that "a shift in theory should be denied, even in the absence of prejudice, where the party seeking to impose it has been guilty of flagrant abuse, bad faith, or truly inordinate and unexplained delay." 388 F.Supp. at 1072 n.2. This analysis, however, is not applicable to the factual setting of this case. First, the addition of a wrongful death claim is not a shift in the theory of recovery but rather a substitution of the decedent's beneficiary for the decedent as the party asserting the claim for pecuniary damages. *See* N.J.S.A. 2A:31-1. Second, there is no basis in the record of this case for finding that Robert Goodman has been "guilty of flagrant abuse" or "bad faith" or that the delay in asserting the wrongful death claim is "truly inordinate and unexplained."

arate items of damage recoverable under N.J.S.A. 2A:31-5[4] and the persons entitled to such damages under N.J.S.A. 2A:31-4.[5] The court undoubtedly has a substantial interest in disposing of old cases. But that interest is not so great as to require a litigant to initiate a separate lawsuit on a wrongful death claim growing out of the same transactions giving rise to the pending causes of action. Thus Goodman urges that the refusal of the district court to permit the amendment in the circumstances

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[4] N.J.S.A. 2A:31-5 provides:

> In every action brought under the provisions of this action the jury may give such damages as they shall deem fair and just with reference to the pecuniary injuries resulting from such death, together with the hospital, medical and funeral expenses incurred for the deceased to the persons entitled to any intestate personal property of the decedent.

[5] N.J.S.A. 2A:31-4 states:

> The amount recovered in proceedings under this chapter shall be for the exclusive benefit of the persons entitled to take any intestate personal property of the decedent, and in the proportions in which they are entitled to take the same. If any of the persons so entitled were dependent on the decedent at his death, they shall take the same as though they were sole persons so entitled, in such proportions, as shall be determined by the court without a jury, and as will result in a fair and equitable apportionment of the amount recovered, among them, taking into account in such determination, but not limited necessarily thereby, the age of the dependents, their physical and mental condition, the necessity or desirability of providing them with educational facilities, their financial condition and the availability to them of other means of support, present and future, and any other relevant factors which will contribute to a fair and equitable apportionment of the amount recovered.

of this case where there would be no substantial prejudice to the adverse party and there is no evidence that the recent assertion of the wrongful death claim is a dilatory trial maneuver was an abuse of discretion.[6]

A conclusion that the court should not have refused to permit the amendment, however, would not end the inquiry because a question would remain whether or not the wrongful death action is time barred. The New Jersey wrongful death action has a separate statute of limitations. N.J.S.A. 2A:31-3, which provides that:

> Every action brought under this chapter shall be commenced within 2 years after the death of the decedent, and not thereafter.

The amended complaint in this case was filed on June 25, 1974, within two years of Mrs. Goodman's death. But this fact alone does not mean that the wrongful death claim is timely. While the New Jersey courts have recognized that the survivor's claim under the Wrongful Death Act is an independent cause of action with its own limitations period and not a derivative of the decedent's personal injury claim, they have placed a gloss on the literal language of N.J.S.A. 2A:31-1 and N.J.S.A. 2A:31-3 inextricably linking the two. According to this gloss a cause of action under the Wrongful Death Act does not vest in the survivor if the decedent died after the expiration of the two year statutory period for commencing a

[6] See, *e.g.*, *Foman* v. *Davis*, 371 U.S. 178 (1962); *United States* v. *Hougham*, 364 U.S. 310 (1960); *Howey* v. *United States*, 481 F.2d 1187 (9th Cir. 1973); *Middle Atlantic Utilities Co.* v. *S.M.W. Development Corp.*, 392 F.2d 389 (2d Cir. 1968).

personal injury action without having done so.[7] Thus the viability of the wrongful death action in this case turns on whether or not Mrs. Goodman's personal injury action was time barred when it was filed. If it was, then the wrongful death action was also barred even though brought within the time permitted by N.J.S.A. 2A:31-3. If it was not, the wrongful death claim was timely and should be heard. *Redick* v. *Rohm & Haas Co., supra.* We turn, then, to the New Jersey law on limitations of personal injury actions.

III. The New Jersey Personal Injury Statute of Limitations and the "Discovery Rule"

N.J.S.A. 2A:14-3 provides that:

> Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced

[7] *E.g.*, *Knabe* v. *Hudson Bus Transportation Co.*, 111 N.J.L. 333, 168 A. 418 (E.&A. 1933); *Redick* v. *Rohm & Haas Co.*, 97 N.J. Super. 58, 234 A.2d 252 (Law Div. 1967); *Kotkin* v. *Caprio*, 65 N.J. Super. 453, 168 A.2d 69 (App. Div.), *certif. denied*, 34 N.J. 470, 169 A.2d 745 (1961); *Biglioli* v. *Durotest Corp.*, 44 N.J. Super. 93, 129 A.2d 727 (App. Div. 1957) *aff'd* 26 N.J. 33, 138 A.2d 529 (1958). But see *Lawler* v. *Cloverleaf Memorial Park, Inc.*, 56 N.J. 326, 266 A.2d 569 (1970), which suggests in dicta that the gloss heretofore placed by the courts on N.J.S.A. 2A:31-1 and N.J.S.A. 2A:31-3 is not supported by the statutory language. Justice Jacobs questions whether, the language of N.J.S.A. 2A:31-1, "such as would, if death had not ensued, have entitled the person injured to maintain an action for damages," refers only to the character of the injury and not to the time of suit or death. 56 N.J. at 344-45, 266 A.2d at 578-79.

> within 2 years next after the cause of any such action shall have accrued.

Whether the plaintiff asserts a legal theory of negligence or of breach of warranty this statute covers all personal injury claims.[8] The same statute applies to a husband's *per quod* claim, which is only maintainable because of injury to his wife.[9] But the statute is silent as to when "the cause of action shall have accrued." In *Fernandi* v. *Strully,* 35 N.J. 434, 173 A.2d 277 (1961), the Supreme Court of New Jersey first announced that the two year statute of limitations on a medical malpractice action did not begin to run when the negligence occurred but commenced instead when the plaintiff knew or had reason to know of the presence in his body of a post-operative foreign object. But the "discovery" rule soon evolved, extending both outside the malpractice field and to the point where the statute did not begin to run until the injured party knew, or reasonably should have known, not only of the injury but also of the basis for an actionable claim.

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[8] *E.g., Oroz* v. *American President Lines, Ltd.,* 259 F.2d 636 (2d Cir. 1958), *cert. denied,* 359 U.S. 908 (1959); *Heavner* v. *Uniroyal, Inc.,* [CCH Products Liability Reports ¶6716] 118 N.J. Super. 116, 286 A.2d 718 (App. Div. 1972), *aff'd* 63 N.J. 130, 305 A.2d 412 (1973); *Tackling* v. *Chrysler Corp.,* 77 N.J. Super. 12, 185 A.2d 238 (Law Div. 1962).

[9] *E.g., Rex* v. *Hunter,* 26 N.J. 489, 140 A.2d 753 (1958).

This development is traced in Justice Mountain's opinion in *Lopez* v. *Swyer,* 62 N.J. 267, 300 A.2d 563 (1973).[10]

In this case it is undisputed that Mrs. Goodman was aware she had thrombophlebitis in June of 1967 and was aware she had cancer after a biopsy on February 27, 1969. Thus, at least as to the thrombophlebitis claim, the critical inquiry in determining when "the cause of any . . . action shall have accrued" against Mead Johnson for Mrs. Goodman's personal injuries is when she knew, or reasonably should have known, that she had a basis for such a claim. Even then the application of the "discovery" rule is not automatic. As Justice Mountain emphasized in *Lopez* v. *Swyer*:

> The issue will be whether or not a party, either plaintiff or counter-claimant, is equitably entitled to the benefit of the discovery rule. All relevant facts and circumstances should be considered. The determinative factors may include but need not be limited to: the nature of the alleged injury, the availability of witnesses, the length of time that has elapsed since the alleged wrongdoing, whether the delay has been to any extent deliberate or intentional, whether the delay may be said to have peculiarly or unusually prejudiced the defendant. The burden of proof will rest upon the party claim-

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[10] After *Lopez* v. *Swyer,* the rule was extended to contractual time limitations, *Jones* v. *Continental Cas. Co.,* 123 N.J. Super. 353, 303 A.2d 91 (Chan. Div. 1973), and later to plaintiffs aware of the basis of their claim but unaware of the proper identity of a potential defendant, *Aruta* v. *Keller,* 134 N.J. Super, 522, 342 A.2d 231 (App. Div. 1975); *Lawrence R. McCoy Co., Inc.* v. *S. S. Theomitor III,* 133 N.J. Super. 308, 336 A.2d 80 (Law Div. 1975).

ing the indulgence of the rule. 62 N.J. at 275-76; 300 A.2d at 567-68 (footnote omitted).

The district court did not reach any of these equitable considerations. Instead it granted summary judgment on both personal injury claims and on Mr. Goodman's *per quod* claim, because it found that Mrs. Goodman knew or should have known that she had a claim against Mead Johnson for the thrombophlebitis on or about June 19, 1967.

It is significant for our consideration of the propriety of that ruling that under New Jersey law the issue of when the discovery of an actionable claim occurred is a question of fact for the court and not for the jury. Again borrowing Justice Mountain's expression in *Lopez* v. *Swyer*:

> It is true that the time of discovery is a question of fact, and so could be left to the jury. But, as we have indicated, the matter does not rest there. It is not every belated discovery that will justify the application of the rule lifting the bar of the limitations statute. The interplay of the conflicting interests of the competing parties must be considered. The decision requires more than a simple factual determination; it should be made by a judge and by a judge conscious of the equitable nature of the issue before him.
>
> The determination by the judge should ordinarily be made at a preliminary hearing and out of the presence of the jury. (footnotes omitted). 62 N.J. at 274-75, 300 A.2d at 567.

If the district court in this diversity case was required to make the factual determination with respect to the time of discovery, even on disputed facts, our scope of review would obviously be quite different than if we were merely reviewing the disposition of a summary judgment motion. Assuming the district court applied the correct law we would review the court's factual findings by the clearly erroneous standard of Rule 52(a), Fed. R. Civ. P., rather than the genuine issue as to any material fact standard of Rule 56(c), Fed. R. Civ. P. Thus we must turn to the effect of *Lopez* v. *Swyer, supra,* in a diversity case.

IV. Lopez v. Swyer and Byrd v. Blue Ridge Rural Electric Cooperative, Inc.

In announcing the rule in *Lopez* v. *Swyer, supra,* that the time of discovery is a question of fact to be decided by the court rather than the jury, the New Jersey Supreme Court pointed to cases antedating the 1947 New Jersey Constitution in which the then separate Chancery Court entertained suits to enjoin the plea of the statute of limitations in actions at law where some conduct of the defendant in the legal action rendered it inequitable that he be allowed to avail himself of that defense.[11] These cases, while they provide a persuasive historical analogy for the *Lopez* discovery rule proceeding, do not suffice to decide the quite different issue of the respective roles of judge and jury in the federal courts bound by the strictures of the seventh amendment. In the first place even if prior to 1938, the effective date of the Federal Rules of Civil

[11] 62 N.J. at 275 n.2, 300 A.2d at 567 n.2.

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Procedure which abolished the procedural distinctions between actions at law or in equity, federal equity courts entertained actions to enjoin pleas of the statute of limitations at law based upon the inequitable conduct of the party asserting it, such cases would not control our disposition of this action, for the New Jersey discovery rule does not depend at all upon the conduct of the party asserting the defense, but rather upon the state of knowledge of the party asserting the claim. Moreover, the statute of limitations in the federal courts is a traditional legal defense. See Fed. R. Civ. P. 8(c). That this defense would be decided in New Jersey courts by the judge rather than by the jury is not dispositive of the manner in which it should be decided in a federal court.

In *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958), a diversity negligence case, the defendant asserted that it was the plaintiff's employer under South Carolina law, and consequently that the exclusive remedy provision of that state's workmen's compensation statute barred the suit. In the South Carolina courts the statutory employer issue was passed upon by the court, not by the jury. The Supreme Court held that despite the South Carolina rule the fact issue whether the defendant was a statutory employer must in the federal court be decided by the jury. Departing from what had theretofore been a somewhat mechanical application of state rules of decision under the rubric "outcome determinative" the Court made the following interest analysis:

> Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should

Appendix A

> not come out one way in the federal court and another way in the state court. . . .
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> . . . The trial judge in the federal system has powers denied the judges of many States to comment on the weight of the evidence and credibility of witnesses, and discretion to grant a new trial if the verdict appears to him to be against the weight of the evidence. We do not think the likelihood of a different result is so strong as to require the federal practice of jury determination of disputed factual issues to yield to the state rule in the interest of uniformity of outcome. (footnote omitted). 356 U.S. at 538, 540.

Accord, Magenau v. *Aetna Freight Lines,* 360 U.S. 273 (1959). Nor is the state court's designation of its rule as "equitable" controlling in the federal court. *Simler* v. *Conner,* 372 U.S. 221, 222 (1963) (per curiam).

Under *Lopez* v. *Swyer, supra,* New Jersey places the burden of proof on the issue of time of discovery on the party claiming the benefit of the rule. Even if the factual determination is made by a federal jury rather than by the court the allocation of burden of proof would follow the state practice. *Palmer* v. *Hoffman,* 318 U.S. 109, 117 (1943). 2A J. Moore, Federal Practice ¶8.27[2] at 1847 (2d ed. 1975). Thus the area of conflict between state and federal policies is quite narrow.

When the New Jersey Supreme Court in *Lopez* v. *Swyer, supra,* gave content to the "shall have accrued" language of N.J.S.A. 2A:14-2, and relegated decision of the issue of discovery of the cause of action to the court rather than to the jury, it based its choice upon careful

consideration of competing state policies.[12] One set of policies favored repose, while another favored a reasonable opportunity for an injured party to make an intelligent decision regarding suit. In concluding that these conflicting policies could in individual instances best be resolved by a court rather than a jury, however, the New Jersey Supreme Court did not suggest that this judgment was so intimately bound up with the merits of the discovery rule itself that the effect of the rule would be negated in any way if another method of fact finding were resorted to. Indeed, Justice Mountain's opinion discloses that the court rather than the jury was chosen to make the necessary factual determination in a discovery rule proceeding primarily for reasons of convenience and efficiency.[13] Relegating the *Lopez* v. *Swyer* determination to the court rather than the jury, of course, permits its early resolution, before the expenditure of legal and judicial resources in the discovery aspects of the merits of the case. It is true that the court spoke of equitable considerations which might influence the judge's decision.[14] But an adequate accommodation of any New Jersey interests in the judicial determination of those equitable considerations can be accomplished by submitting the concomitant fact issues to the jury on special interrogatories, while reserving to the court the decision with respect to the legal effect of those facts so determined.

We conclude that as with the "statutory employer" defense in *Byrd* v. *Blue Ridge Electric Cooperative, Inc.*,

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[12] 62 N.J. at 274, 300 A.2d at 566-67.

[13] 62 N.J. at 275, 300 A.2d at 567.

[14] 62 N.J. at 274-75, 300 A.2d at 567.

supra, the federal policy favoring jury decisions of disputed fact questions must prevail over the state practice of allocating to the court the decision as to the time of discovery of the cause of action. Thus if there are any disputed issues of fact we cannot affirm their resolution by the court on the authority of *Lopez* v. *Swyer, supra.* We must review by the standard of Rule 56, Fed. R. Civ. P.

V. The Rule 56 Motion

Rule 56 allows the trial court to grant summary judgment if it determines from its examination of the allegations in the pleadings and any other evidential source available that no genuine issue as to a material fact remains for trial, and that the moving party is entitled to judgment as a matter of law. The purpose of the rule is to eliminate a trial in cases where it is unnecessary and would only cause delay and expense.[15] On review the appellate court is required to apply the same test the district court should have utilized initially. Inferences to be drawn from the underlying facts contained in the evidential sources submitted to the trial court must be viewed in the light most favorable to the party opposing the motion. The non-movant's allegations must be taken as true and, when these assertions conflict with those of the movant, the former must receive the benefit of the doubt.[16]

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[15] *E.g., Tomalewski* v. *State Farm Life Insurance Co.,* 494 F.2d 882 (3d Cir. 1974); *Mintz* v. *Mathers Fund, Inc.,* 463 F.2d 495, 498 (7th Cir. 1972).

[16] *E.g., United States* v. *Diebold, Inc.,* 369 U.S. 654 (1963) (per curiam); *Smith* v. *Pittsburgh Gage & Supply Co.,* 464 F.2d 870, (3d Cir. 1972).

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In support of its motion for summary judgment Mead Johnson claimed that Mrs. Goodman had knowledge or should have had knowledge of an actionable claim against it in June of 1967. At that time she was hospitalized for thrombophlebitis. Mrs. Goodman's deposition discloses that while she was hospitalized Dr. Harold Schwartz, who had prescribed Oracon, apparently for its estrogen content, as a treatment for eczema, advised her to stop using it, and mentioned that "there had been cases of correlation between taking The Pill and phlebitis." (Florence Goodman deposition at 25). In addition, Mead Johnson had served requests for admission, including request No. 7:

> The plaintiff knew in June 1967 that there might be a relationship between her thrombophlebitis and her taking Oracon.

This request for admissions was not denied, and for purposes of the motion for summary judgment was properly deemed admitted under Rule 36(a).[17] Finally there was evidence in the form of a deposition of Goodman's present attorney, suggesting that Mrs. Goodman had consulted another attorney about a suit against Mead Johnson as early as June 11, 1968. (Morris deposition at 26-28). The district court fixed the date of the thrombophlebitis discovery as June of 1967. The court then concluded that this date also fixed the time of discovery of the cancer claim and Mr. Goodman's *per quod* claim. We address these conclusions in reverse order.

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[17] E.g., Fed. R. 56(c); *O'Campo* v. *Hardisty*, 262 F.2d 621 (9th Cir. 1968); *Jackson* v. *Riley Stoker Corp.*, 57 F.R.D. 120 (E.D. Pa. 1972).

Appendix A

A. The Per Quod Claim

Plainly the present record will not support a summary judgment that Mr. Goodman discovered that he had a *per quod* claim against Mead Johnson for injury to his wife in June of 1967 or at any other time more than two years before the filing of the complaint. The district court did not suggest otherwise. The opinion simply does not deal with the husband's separate *per quod* claim. Summary judgment could be sustained on this claim only if, assuming the wife's claim were barred, the same bar applied, as a matter of law, to him. The precise issue of the application of the discovery rule to a *per quod* claim has not been discussed in any New Jersey case which has been called to our attention. As we pointed out above[18] the two year personal injury statute of limitations applies to the husband's *per quod* claim. But it does not follow that its application to him, and in particular the application of the discovery rule to him, depends on the date of his wife's discovery rather than the date of his own. Although it is dependent upon an actionable wrong having been committed against his wife, a husband's *per quod* claim is independent from and not a derivative of her personal injury claim. He is suing in his own right for an injury to his relational interest in his wife and for his out-of-pocket expenses.[19] Since his action is independent, the courts of New Jersey would, we are convinced, require a separate determination of the

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[18] See note 9 *supra*.

[19] *E.g.*, *Patusco* v. *Prince Macaroni, Inc.*, 50 N.J. 365, 235 A.2d 465 (1967); *Kimpel* v. *Moon*, 113 N.J.L. 220, 174 A. 209 (Sup. Ct. 1934).

date of his discovery of a claim against Mead Johnson. Thus the summary judgment barring the *per quod* claim cannot stand.

B. The Cancer Claim

The district court held that the cancer claim was barred by the virtue of the discovery in June of 1967 of the thrombophlebitis claim. The court's theory was that by looking to separate dates of discovery it would be permitting the splitting of a cause of action for a single personal injury. The rule against the splitting of causes of action in New Jersey is well settled.[20] But it has no relevance to the cancer claim pleaded here unless we assume that the thrombophlebitis of the leg and the carcinoma of the breast are the results of exposure to an identical risk. There is no evidence whatsoever that the thrombophlebitis and the carcinoma were the product of the same chain of causality. Certainly plaintiff contends that the two separate injuries were caused independently by the same drug. At least at this stage in the proceedings we cannot hold that Mead Johnson exposed Mrs. Goodman to a single risk resulting in separate manifestations of injury. The duty of a manufacturer to use care and to issue appropriate warnings is not identical with respect to risk of circulatory ailments and with respect to risk from carcinogenic substances. A warning about one risk probably would be irrelevant to the other.

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[20] *E.g., Tortorello* v. *Reinfeld*, 6 N.J. 58, 77 A.2d 240 (1950); *Smith* v. *Red Top Taxicab Co.*, 111 N.J.L. 439, 168 A. 796 (E.&A. 1933); *Rankin* v. *Sowlinski*, 119 N.J. Super. 393, 291 A.2d 849 (App. Div. 1972).

The testing required to detect one risk would be quite different from that required to detect the other.

On this record there is a fact issue as to whether Mrs. Goodman knew she might have a claim against Mead Johnson for her breast cancer until some time within two years of the filing of the complaint. Indeed the biopsy did not take place until February 27, 1969 and the complaint was filed within two years thereafter. Thus the award of summary judgment barring the estate's claim for Mrs. Goodman's breast cancer cannot stand.

C. The Thrombophlebitis Claim

The case for summary judgment on the thrombophlebitis claim is certainly stronger than on either the *per quod* claim or the cancer claim. Mrs. Goodman knew in June of 1967 that she had thrombophlebitis. The request for admissions establishes, as well, that she knew then there *might* be a relationship between the disease and her use of Oracon. But the knowledge that there *might* be a relationship is not identical with knowledge of an actionable claim against the manufacturer for negligent testing or compounding or for failure to warn of known hazards. The doctor's advice in June, 1967 that she should stop using Oracon is equally equivocal. A person of ordinary diligence and intelligence receiving such advice might reasonably have concluded that although the manufacturer had adequately tested the drug and adequately warned against all known hazards, its continued use for her particular condition was nevertheless inadvisable. Finally, there is her consultation with an attorney. But even this evidence is equivocal, since both she and the attorney are dead and we do not know what he

told her. At best there are inferences which can be drawn as to her state of knowledge. Admittedly they are strong inferences, but they are still inferences which can only be drawn by the finder of fact, in this case the jury. In summary, there is at least some doubt as to the facts on plaintiff's thrombophlebitis claim which makes the award of summary judgment on this claim inappropriate.[21]

VI. Conclusion

There are on this record genuine issues of material fact with respect to the time when the decedent, Mrs. Goodman, and her husband discovered that they might have a claim against Mead Johnson for the thrombophlebitis, her cancer, his loss of consortium, and her death. The Order granting summary judgment is reversed. On remand the district court should permit the amendment of the complaint asserting the wrongful death action.

Rosenn, C. J., Concurring and Dissenting: The majority has added another chapter to the ongoing saga of federal courts' efforts to reconcile the command of *Erie Railroad Co.* v. *Tomkins,* 304 U.S. 64 (1938), with the purposes of federal rules and policies. The majority concludes that *Byrd* v. *Blue Ridge Electric Cooperative, Inc.,* 356 U.S. 525 (1958), requires that the New Jersey practice of allocating to the court the decision as to when a cause of action is "discovered" for the purpose of applying the statute of limitations, must yield, in a federal

[21] *E.g., Tomalewski* v. *State Farm Insurance Co., supra* at 884.

diversity action, to the federal policy favoring jury decisions of disputed issues of fact. I dissent from that conclusion because I believe that the majority has misconstrued the New Jersey Supreme Court's decision in *Lopez* v. *Swyer,* 62 N.J. 267, 300 A.2d 563 (1973). My difference on that point leads me to some disagreement with the majority on the disposition of the claims presented.

I.

It is, of course, clear that *Byrd* does not require a federal court trying a diversity case to submit to the jury every issue that may be fairly characterized as factual, regardless of whether the governing state law would submit the issue to the judge. The Supreme Court's opinion in *Byrd* makes it clear that when the state practice of trying an issue to the judge is "bound up" with the rights and obligations of parties under state law, the federal court should follow the state practice. See 356 U.S. at 535, 536, 538.

To determine whether the South Carolina practice, reviewed in *Byrd,* of having the judge decide the statutory employer issue was an integral part of state substantive law, the Court examined the origins of the practice. The South Carolina case announcing the rule furnished "no reason for selecting the judge rather than the jury to decide" the issue. 356 U.S. at 536. The rule appeared to have evolved from the state's practice in judicial review of administrative decisions. *Id.* Accordingly, the Court found:

> nothing to suggest that this rule was announced as an integral part of the special relationship created by the [Workmen's Compensation] statute.

> Thus, the requirement appears to be merely a form and mode of enforcing the immunity . . . and not a rule intended to be bound up with the definition of the rights and obligations of the parties.

Id.

A year later, the Court followed a similar analysis in *Magenau* v. *Aetna Freight Lines, Inc.,* 360 U.S. 273 (1959). At issue there was the Pennsylvania practice of having the trial judge decide whether a Workmen's Compensation Act plaintiff was the defendant employee and whether the employment was "casual" and not "in the regular course" of defendant's business. Again finding "no reason" for the state practice, 360 U.S. at 278, the Court held that in a federal diversity case the issues would be submitted to the jury.

In contrast to the paucity of reasoning supporting the state practices considered in *Byrd* and *Magenau,* we are confronted in *Lopez* v. *Swyer, supra,* with a carefully considered decision to allocate to the judge rather than to the jury the decision whether a personal injury plaintiff has "discovered" his or her cause of action within the statutory period. The *Lopez* opinion, in reviewing the history of the discovery rule, 300 A.2d at 566-7, stated that the rule requires the accommodation of two conflicting policies. On one hand, the rule is intended to mitigate "the often harsh and unjust results which flow from a rigid and automatic adherence" to a strict statute of limitations. 300 A.2d at 566. On the other hand, it may be unjust "to compel a person to defend a law suit long after the alleged injury has occurred, when memories have faded, witnesses have died, and evidence has been lost." 300 A.2d at 567. Thus, "in each case the equitable

claims of opposing parties must be identified, evaluated and weighed." *Id.*

> It is not every belated discovery that will justify an application of the rule lifting the bar of the limitations statute. The interplay of the conflicting interests of the competing parties must be considered. The decision requires more than a simple factual determination; it should be made by a judge conscious of the equitable nature of the issue before him.
>
> *Id.*

In my view, this analysis is not, as the majority suggests, predicated "primarily [on] reasons of convenience and efficiency." Nor is it merely a "form and mode of enforcing," 356 U.S. at 536, the discovery rule. To be sure, the *Lopez* Court considered the practical aspects by its decision[1] but it noted that "the matter does not rest there." 300 A.2d at 567. As the New Jersey Supreme Court envisioned the rule's operation, "a simple factual determination" of belated discovery of injury will not perfunctorily dictate application of the rule. Furthermore, the Court instructed its trial courts that:

> All relevant facts and circumstances should be considered. The determinative factors may include, but need not be limited to: the nature of the alleged injury, the availability of witnesses and written evidence, the length of time that has elapsed since the alleged wrongdoing, whether the delay

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[1] It noted that "submission of the issue to a jury is in every sense awkward." 300 A.2d at 567.

> has been to any extent deliberate or intentional, whether the delay may be said to have peculiarly or unusually prejudiced the defendant.

300 A.2d 568. Thus, the application of New Jersey's discovery rule requires a consideration and balancing of a complex of factors. The balancing envisioned by *Lopez,* is a unitary process not readily divided into "factual" and "equitable" components. As I read *Lopez,* the allocation of this decision to the trial judge is "intended to be bound up with the . . . rights and obligations of the parties" under state law, *Byrd, supra,* 356 U.S. at 536, and the federal courts are thus obligated to follow the state practice.

The majority attempts to compromise the conflicting demands of *Erie* and the Seventh Amendment by bifurcating the factual and equitable components of the *Lopez* determination. There is nothing in *Byrd* which requires such a compromise where the state practice is an integral part of the substantive law. Also, the majority's approach may require a lengthy jury trial before the statute of limitations can be decided. This procedure is awkward and unnecessarily requires the expenditure of legal and judicial resources. More importantly, the majority approach might encourage forum shopping; a litigant whose case presents a "discovery rule" question may prefer to appeal to the sympathies of a jury and thus choose the federal forum over New Jersey's courts. Discouragement of such forum shopping was one of the policy bases underlying the *Erie* decision. *See Witherow* v. *Firestone Tire & Rubber Company,* No. 75-1514 (Decided January 26, 1976, slip opinion at 6-7). Indeed, varying "statutes of limitation, perhaps more than any other kind of disparity, present opportunity for the kind of forum shopping *Erie* intended to preclude." *Id.* at 9. Not only does encouragement of resort to federal courts undermine *Erie,* but it increasingly burdens federal courts with diversity cases.

In short, I view New Jersey's allocation of the discovery rule determination to the trial judge as a matter of substantive New Jersey law which, under the mandate of *Erie,* federal courts are bound to follow.[1a]

II.

Since I view the question of whether a personal injury plaintiff under New Jersey law knew or should have known of his or her cause of action within two years of filing his or her complaint as a question for the trial court, I review the factual findings of the district judge in this case under the "clearly erroneous" standard of Federal Rule of Civil procedure 52(a). I rely on the majority opinion's account of the evidence in the record.

[1a] In Thomas v. E. J. Korvette, Inc., 476 F.2d 471 (3d Cir. 1973), I conclude that in a malicious prosecution suit based on Pennsylvania law, the issue of probable cause should be decided as a legal question by the trial judge "based upon special findings of the jury as to any disputed questions of fact." *Id.* at 480. I felt that we were free to fashion our own rule in that case because Pennsylvania law treated the allocation as a procedural matter not bound up with the fundamental rights of the parties. *Id.* As I read *Lopez,* we have a different situation here. Furthermore, bifurcating the probable cause issue in *Thomas* was not procedurally cumbersome because probable cause was an ultimate issue in the case, rather than a preliminary question as is the discovery exception.

Appendix A

The evidence with respect to Mrs. Goodman's knowledge of her cause of action for thrombophlebitis includes statements of her doctor and her consultation with an attorney, both prior to June 11, 1968, and the admission. Suit was not instituted until February 25, 1971. On that record, I cannot say that the district court's conclusion that she knew or should have known of her claim more than two years before filing the complaint is clearly erroneous.

With respect to the cancer claim, I agree with the majority that the district court's legal analysis is insufficient. There is no evidence in the record to support the district court's assumption that the cancer claim and the thrombophlebitis claim represent but one cause of action. I think it is entirely possible that, on a record adequately indicating the complex biochemical and physiological processes involved with oral contraceptives, New Jersey law might recognize separate causes of action for Mrs. Goodman's thrombophlebitis and cancer illnesses. The district court should have conducted some inquiry into the medical aspects of this problem before assuming that there was but one cause of action which plaintiff sought to split.[2]

Finally, I agree with the majority that summary judgment on the per quod claim was inappropriate. Even though I would sustain the district court's decision that

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[2] Of course, if the district court determines that the cancer claim is a separate cause of action, there is no statute of limitations problem, because the complaint was filed within two years of Mrs. Goodman's learning that she had cancer. If the district court correctly determines that Mrs. Goodman had but one cause of action, I would sustain its conclusion that the action is time barred for the reasons expressed on the thrombophlebitis claim.

Appendix A

the thrombophlebitis claim is time barred. I agree that, insofar as Mr. Goodman's claim relates to Mrs. Goodman's thrombophlebitis, there is no evidence indicating his knowledge of his independent cause of action. Furthermore, if the cancer claim is independent of the thrombophlebitis claim, Mr. Goodman's per quod claim with respect to Mrs. Goodman's cancer is not time barred, because the complaint was filed within two years of the discovery of the cancer.

III.

Accordingly, I would affirm the judgment of the district court with respect to the thrombophlebitis claim, and I would reverse and remand that court's judgment with respect to the cancer and per quod claims for further action consistent with this opinion.

APPENDIX B

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1333

FLORENCE L. GOODMAN, and ROBERT J. GOODMAN, individually and as Executor of the Estate of Florence L. Goodman, deceased,

vs.

MEAD JOHNSON & COMPANY, HAROLD SCHWARTZ, CAROLINA SUBURBAN CO., INC., and JOHN DOE and/or JOHN DOE, INC. (the defendant intended being the distributor of the product herein to Carolina Suburban Co. Inc.)

ROBERT J. GOODMAN, individually and as Executor of the Estate of Florence L. Goodman,

Appellant.

(D. C. Civil No. 271-71)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: ADAMS, GIBBONS and ROSENN, Circuit Judges

Appendix B

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit Rule 12(6).

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed January 8, 1975, be, and the same is hereby reversed and remanded with the direction that the said District Court should permit the amendment of the complaint asserting the wrongful death action. Costs taxed against appellee.

ATTEST

THOMAS QUINN
Clerk

April 2, 1976

Certified as a true copy and issued in lieu of a formal mandate on May 18, 1976.

Test: M. ELIZABETH FERGUSON
Chief Deputy Clerk, United States Court of Appeals for the Third Circuit

APPENDIX C

Order of the United States Court of Appeals for the Third Circuit Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1333

FLORENCE L. GOODMAN, and ROBERT J. GOODMAN, individually and as Executor of the Estate of Florence L. Goodman, deceased,

vs.

MEAD JOHNSON & COMPANY, HAROLD SCHWARTZ, CAROLINA SUBURBAN CO., INC., and JOHN DOE and/or JOHN DOE, INC. (the defendant intended being the distributor of the product herein to Carolina Suburban Co. Inc.)

ROBERT J. GOODMAN, individually and as Executor of the Estate of Florence L. Goodman,

Appellant.

(D. C. Civil No. 271-71)

SUR PETITION FOR REHEARING

Present: VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, Circuit Judges.

Appendix C

The petition for rehearing filed by Appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having been asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Garth would grant rehearing en banc.

By the Court,

JOHN J. GIBBONS
Judge

Dated: May 10, 1976.

APPENDIX D

Opinion of the United States District Court of the District of New Jersey

ROBERT J. GOODMAN, individually and as Executor of the Estate of Florence L. Goodman,

Plaintiff,

v.

MEAD JOHNSON & COMPANY,

Defendant.

In the United States District Court, District of New Jersey. Civil Action No. 271-71. Dated: December 30, 1974.

For the Plaintiffs Goodman: William R. Morris.

For the Defendant: Bernard Chazen.

STERN, D. J.: This is a diversity action. New Jersey resident Robert Goodman, as Executor of his wife's estate and individually, sues Mead Johnson & Co., a Delaware corporation, for injuries to Florence Goodman allegedly caused by defects in a product manufactured by the defendant.

The factual matrix of the complaint reveals that Florence Goodman used an ethical drug, Oracon,[1] which was

[1] Oracon is a birth contraceptive drug. It appears that it was prescribed to Florence Goodman by her physician for the treatment of eczema (Florence Goodman Dep., pp. 23, 27).

manufactured by the defendant. During her use of Oracon, she experienced a swelling of the leg, later diagnosed as thrombophlebitis, and a lump in the right breast, later diagnosed as cancer. Florence Goodman thereafter brought suit alleging: (1) that the defendant was negligent in publicly distributing its product without proper or adequate warning on the face of the product sold of the harmful side effects and contra-indications; and (2) that the defendant breached its warranty of merchantability when it sold a defective product. After the institution of suit, Florence Goodman died and her husband, as Executor of her estate, was substituted in her place.[2] Robert

[2] At the March 26, 1974 status conference, the Court was informed that Florence Goodman had died. The Court then granted plaintiff leave to substitute the representative of Florence Goodman's estate as the real party in interest pursuant to Rule 17 of the Federal Rules of Civil Procedure.

On June 25, 1974, plaintiff filed a second amended complaint which substituted Robert Goodman, Executor of Florence Goodman's estate, for Florence Goodman. However, plaintiff also amended the complaint to include allegations of wrongful death. This action was undertaken without leave of court or written consent of the adverse party as required by Rule 15 of the Federal Rules of Civil Procedure. Florence Goodman died May 22, 1973. (Plaintiff's Answer to Defendant's Supplementary Interrogatory No. 1(a)). Plaintiff had over one year after the death of Florence Goodman to allege these new causes of action. Now, on the eve of trial of this three-year old case, after the completion of discovery, he attempts to inject new causes of action into this lawsuit through an improper use of the Federal Rules of Civil Procedure.

To permit plaintiff to amend its complaint will undoubtedly cause the defendant to suffer prejudice in its defense of this suit. Discovery, now completed, will have to be re-instituted and the trial date of this case will be delayed again.

(Footnote continued on following page)

Goodman, in his individual capacity, sues the defendant for damages *per quod*.

The instant motion by defendant is for summary judgment premised upon the New Jersey State statutes of limitation,[3] which, in this diversity case, control.[4]

The applicable statute of limitations on the negligence claims is embodied in N.J.S.A. 2A:14-2, which states:

> "Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued."

The two-year limitation of N.J.S.A. 2A:14-2 is also applicable to plaintiff's claim of breach of the implied war-

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(Footnote continued from preceding page)

"As we see it, a shift in theory should be denied, even in the absence of prejudice, where the party seeking to impose it has been guilty of flagrant abuse, bad faith, or truly inordinate and unexplained delay." *Matlack, Inc.* v. *Hupp Corporation*, 57 F.R.D. 163 (E.D. Pa. 1972).

Accordingly, on this motion the Court shall only consider the allegations of the complaint as stated in the first amended complaint filed on June 10, 1971. However, the Court will allow Robert Goodman, Executor of the estate of Florence Goodman, to be substituted for Florence Goodman.

[3] The Court notes that this is defendant's fourth summary judgment motion based upon the statutes of limitations. The previous identical motions were denied without prejudice to the right of the defendant to renew at a later date.

[4] *Gleason* v. *United States*, 458 F.2d 171, 174 (3rd Cir. 1972).

ranty of merchantability. Although breach of warranty claims sound in contract, the New Jersey courts have not applied the limitation of actions provision, N.J.S.A. 12A:2-725, which relates to breach of any contract for sale whenever damages are sought for personal injury. Instead, the New Jersey courts have construed the time limitations of N.J.S.A. 2A:14-2 to apply to all personal injury claims irrespective of whether they fall within the traditional classifications of tort or contract.[5] *Heavner* v. *Uniroyal, Inc.*, [CCH PRODUCTS LIABILITY REPORTS ¶7013] 63 N.J. 130, 305 A.2d 412 (1973).

The original complaint was filed on February 25, 1971. Decedent plaintiff used defendant's drug from April 4, 1967 to June 19, 1967. (Florence Goodman Dep., pp. 17, 21) Thus, this action was commenced more than three and one-half years after the last use of defendant's product.

The law of New Jersey is clear:

> . . . in an action for personal injuries, the two-year statute, computed from the date of occurrence of the injuries (or in some situations the date of their discovery), would govern, whether the causes of action were pleaded in tort (negligence) or for breach of warranty in connection with a sale of goods or for violation of contract. . . .
>
> *Heavner* v. *Uniroyal, supra.*

Hence, if defendant's product caused injury to plaintiff's decedent, the injury occurred on or before June 19,

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[5] N.J.S.A. 2A:14-2 also applies to the *per quod* claims. *Rex* v. *Hunter*, 26 N.J. 489, 140 A.2d 753 (1958).

1967. Under the normal statute of limitations analysis, plaintiff, having commenced suit over three years after the accrual of the cause of action, would be barred from pursuing a remedy in court. However, the New Jersey courts have adopted the "Discovery Rule" as an exception to the mechanical application of the personal injury statute of limitations. This doctrine provides:

> . . . in an appropriate case a cause of action will be held not to accrue until the injured party discovers, or by reason of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim.
>
> • • •
>
> "The discovery rule is essentially a rule of equity. It has been said that in equity lies its genesis. *Owens* v. *White,* 342 F.2d 817, 820 (9th Cir. 1965). Like so many other equitable doctrines it has appeared and is developing as a means of mitigating the often harsh and unjust results which flow from a rigid and automatic adherence to a strict rule of law. On the face of it, it seems inequitable that an injured person, unaware that he has a cause of action, should be denied his day in court solely because of his ignorance, if he is otherwise blameless. Yet such is the result that must follow if the years of the statute are to be inexorably calculated from the moment of the wrong, whether or not the party aggrieved knows or has reason to know that he has a right of redress. Parenthetically, we note that the ignorance of which we speak may be of more than one kind. A person may, for instance, be unaware that he has sustained injury until after the statute of limitations has run. This was true in both *New Market Poultry Farms, Inc.* and *Diamond, supra,* where, in each case, the fact of the wrong lay hidden until after the prescribed time had passed. In other cases damages may be all too apparent, but the injured party may not know that it is attributable to the fault or neglect of another. . . .

It may also be unjust, however, to compel a person to defend a law suit long after the alleged injury has occurred, when memories have faded, witnesses have died and evidence has been lost. After all, statutes of limitations are statutes of repose and the principal consideration underlying their enactment is one of fairness to the defendant. Developments in the Law-Statutes of Limitations, 63 Harv.L. Rev. 1177, 1185 (1950). So in each case the equitable claims of opposing parties must be identified, evaluated and weighed. Where, as is often the case, they cannot be wholly reconciled, a just accommodation must be reached.

Lopez v. *Swyer,* 62 N.J. 267, 300 A.2d 563 (1973).

In resisting the summary motion, plaintiff has invoked the discovery exception to the statute of limitations.[6] The

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[6] *Lopez* sets out the procedure to be followed by the New Jersey State courts in applying the discovery rule exception to the statute of limitations:

> "It is not every belated discovery that will justify an application of the rule lifting the bar of the limitations statute. The interplay of the conflicting interests of the competing parties must be considered. The decision requires more than a sim-

(Footnote continued on following page)

facts as to when the decedent first discovered her alleged injuries are not in dispute. The date of discovery of the thrombophlebitis injury has been established as June 19, 1967 by the decedent's deposition at page 21.

It is undisputed that on June 19, 1967, Mrs. Goodman was aware that her thrombophlebitis injury existed, and the date of this discovery was also more than three years before she commenced suit. The second pivot of the *Lopez* discovery exception is: At what time did the claimant know, or in the exercise of due diligence should she have discovered, that she had an actionable claim.

The deposition of Mrs. Goodman reveals that medical personnel, upon her entry into the hospital on June 21,

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(Footnote continued from preceding page)

ple factual determination; it should be made by a judge and by a judge conscious of the equitable nature of the issues before him.

"The determination by the judge should ordinarily be made at a preliminary hearing and out of the presence of the jury. Generally the issue will not be resolved on affidavits or depositions since demeanor may be an important factor where credibility is significant. Where credibility is not involved, affidavits, with or without depositions, may suffice; it is for the trial judge to decide. The issue will be whether or not a party, either plaintiff or counterclaimant, is equitably entitled to the benefit of the discovery." 300 A.2d at 567. Footnotes omitted.

This Court invited both parties to utilize oral testimony at the summary judgment motion hearing in order to supplement the affidavits and depositions previously filed; however, neither party availed itself of this opportunity. Cf., *Burnham Chemical Co.* v. *Borax Consolidated, Ltd.*, 170 F.2d 569, 573 (9th Cir. 1948), *cert. denied* 336 U.S. 924 (1949).

1967, had repeatedly told her not take Oracon because of its correlation with thrombophlebitis. (Dep. pp. 10-11)

"Q. You say you continued to use the Oracon even when you were in the hospital with the thrombophlebitis?

"A. No.

"Q. I misunderstood you.

"A. No.

"Q. *Who was it told you to stop taking Oracon?*

"A. *The doctor's nurse, Dr. Schwartz's nurse.*"

Dep. p. 21 (Emphasis added). See also Dep. pp. 10-11.

• • •

"Q. Now, when you stopped taking The Pill after you had called the nurse, did you discuss this with Dr. Goldbas, the fact that you had been on The Pill?

"A. Yes.

• • •

"Q. *Did he confirm that you should not take The Pill anymore?*

"A. *Oh, yes; oh, yes.*

"Q. *Did he tell you you shouldn't take The Pill anymore?*

"A. *I can't really remember his words, but I would imagine what he said was there had been cases of correlation between taking The Pill and phlebitis.*

"Q. So that to the best of your recollection he said something of this type, although you can't tell me his exact words?

"A. Right. There certainly was no question of continuing with The Pill. In fact, in fact he said—

he gave me something in the hospital, in fact, for my hands, estrogen, or something, that wasn't The Pill, but had some of the composition of The Pill. It was just an ointment.

"Q. To continue the treatment for the skin?

"A. For the hands, but not a pill.

"Q. Not in The Pill form?

"A. Right."

Dep. pp. 25-26 (Emphasis added)

Plaintiff also has not denied admission #7 which was served on April 27, 1972:

> "7. The plaintiff knew in June 1967 that there might be a relationship between her thrombophlebitis and her taking of Oracon."

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, admissions which are not denied are deemed admitted, and may form a proper basis for summary judgment. *Jackson* v. *Riley Stoker Corp.*, 57 F.R.D. 121, 122 (E.D. Pa. 1972).

Plaintiff has not demonstrated that he is entitled to the protection of the discovery rule. Indeed, the defendant has firmly established, *via* the deposition of the decedent, that after she discovered her injury and its correlation with the defendant's allegedly defective drug, she brought no suit for three and one-half years, twenty months after the statute had run.

Plaintiff also seeks damages for Mrs. Goodman's injuries from cancer allegedly caused by defendant's drug. The Court reiterates that it was on or about June 19, 1967 that the decedent last utilized the defendant's drug.

Mrs. Goodman's deposition reveals that the first signs of cancer were discovered by her in December, 1968 (Dep. p. 48). Plaintiff contends, however, that discovery of the cancer should be dated as of the day that decedent's biopsy was reported malignant, February 27, 1969, rather than the date of the discovery of symptoms which led to the surgery.

This issue is academic because the New Jersey discovery rule commands that the date which governs the thrombophlebitis claim also governs the cancer claim, for on that date, June 19, 1967, plaintiff's decedent knew she was injured and that she might have a claim for injuries against the defendant. Although it is possible that she did not know the full extent of her injuries at that time, the allegedly wrongful act of the defendant gives the decedent but one cause of action for which only one action can be maintained. *Smith* v. *Red Top Taxicab Co.*, 111 N.J.L. 439, 168 A. 796 (E. & A. 1933). Any later discovery of additional injuries by her did not create any new cause of action. If the rule were otherwise, there would be no limitation on such suits since a known act of negligence may be the proximate cause of some injuries which may not manifest themselves until many years after the injured party had originally discovered the existence of a claim to relief. The equitable discovery rule exception to statutory limitations on suits was not intended to go so far.

As one New Jersey court has aptly stated:

> We find no authority to support the trial judges conclusion that lack of knowledge of the extent of the injury tolls the running of the statute. Quite to the contrary, *Tortorello* v. *Reinfeld, supra,* states that any wrongful act

resulting in an injury to a person, *though slight,* gives rise to a right to institute an action and the cause of action accrues at that time. 6 N.J. at 65, 77 A.2d 240.

Rankin v. *Sowinski,* 119 N.J. Super. 393, 291 A.2d 849 (App.Div. 1972).

We must also note that the decedent engaged an attorney now deceased, to represent her in this matter. Although the precise date when she engaged legal representation is not available, correspondence in the deceased attorney's file definitely places the initial engagement prior to June 11, 1968.[7] (Morris Dep. pp. 26-28) As noted, this action

[7] Another letter dated November 18, 1969 was produced at the Morris deposition. The letter indicates that plaintiff's decedent fully recognized her claim against the defendant.

Although the November 18, 1969 letter was written within two years of the filing of this suit, it clearly demonstrates that the decedent's engagement of her first attorney prior to June, 1968 was directed at the prosecution of the instant suit.

> "Q. Mr. Morris, in answers to interrogatories in this matter you indicated that you were consulted at a certain date. Now, do you have records which establish when you were consulted in this matter?
>
> "A. I did not state to my knowledge in the answers to interrogatories that I was retained on a certain date, but I did approximate the date as about November 3, 1969.
>
> "Q. Now, on what basis did you approximate that?
>
> "A. I received a letter from Mrs. Goodman dated November 18, 1969, wherein she stated:
>
> "'Enclosed is a letter from Mr. Krin, an advertisement for a book that sounds as if it supports my view of "The pill." And the letter evidently is signed by Alan Krim in behalf of the YM-YMA, Essex County, dated November 10, 1969.'" Morris Dep. p. 23.

was not filed until February 25, 1971, two years and eight months after engaging counsel to sue.

There is nothing in the record to contradict the evidence that the decedent knew of her injury and knew, or by an exercise of reasonable diligence or intelligence should have discovered, that she had a claim against the defendant on or about June 19, 1967.

Furthermore, on the undisputed facts herein plaintiff cannot avail himself of the discovery rule to escape the bar imposed by the statute of limitations.

There is no dispute, based on any contested facts, that plaintiff's cause of action accrued on June 19, 1967. Since suit was not instituted until February 25, 1971, approximately three and one-half years later it is barred by the statute of limitations.

Accordingly, summary judgment will be entered for the defendant.

Counsel for the defendant will please prepare and submit, on notice, an appropriate order within ten (10) days.

No party shall recover costs herein.

APPENDIX E

Order of the United States District Court for the District of New Jersey Granting Motion for Summary Judgment

IN THE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION No. 271-71

ROBERT J. GOODMAN, individually and as Executor of the Estate of Florence L. Goodman,

Plaintiff,

v.

MEAD JOHNSON & COMPANY,

Defendant.

A motion having been regularly made by the defendant herein for summary judgment in the defendant's favor dismissing the action on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law,

Now, on considering the pleadings, affidavits, depositions, briefs, etc.; and after hearing counsel for the respective parties and due deliberation having been had, and the decision of the Court having been filed, it is

Appendix E

ORDERED that said motion be and the same hereby is granted and that judgment be entered herein in the defendant's favor dismissing this action in favor of the defendant and against the plaintiff, without costs.

DATED: January 8, 1975.

HERBERT J. STERN
United States District Judge

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO76-174

MEAD JOHNSON & COMPANY, HAROLD SCHWARTZ, CAROLINA SUBURBAN CO., INC., and JOHN DOE and/or JOHN DOE, INC. (the defendant being the distributor of the product herein to Carolina Suburban Co., Inc.),

Petitioners,

vs.

FLORENCE L. GOODMAN and ROBERT J. GOODMAN, individually and as Executor of the Estate of FLORENCE L. GOODMAN, deceased,

Respondents.

Brief in Opposition to Petition for a Writ of Certification to the United States Court of Appeals for the Third Circuit

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744 Broad Street
Newark,New Jersey 07102
(201) 642-0092

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BRIEF in Reply to Petition.

The unsupported conclusions in the petition required an extended reply brief. Cases (26) are cited in the petition that do not feature the facts, quote for substantiation, and are either inapposite or support appellee. The task was assumed by appellee. Attention of the Court is invited to extensive briefs filed below.

The enormity of the issue herein that the buyer be informed, affects an estimated 10 million women on oral contraceptives, of which some 750,000 have been on the sequential pill, the kind herein, aside from the grossly uncounted broadened field of medicants and consuming products with lack of warning to the public of their deleterious causes. The proportions are endemic, if not epidemic. It appears that as of February 26, 1976 the Federal Drug Administration issued a press release that the petitioner, Mead Johnson and Co. had withdrawn its pill Oracon from the market because of its hazardous risks, to wit thromboembolic conditions and cancer. Copies of the letter of the FDA, dated May 5, 1976, with enclosed press release are in the appendix herein. It is submitted that as in recall campaigns, consideration should be given to accord direct notice to physicians, pharmacies, other dispensors, and consumers of deleterious products.

Though the suit was filed February 25, 1971, or within 2 years of the biopsy showing cancer, it would appear that the withdrawal by the petitioner of its product about February 26, 1976 was the initial acknowledgement by petitioner to the public of the hazards of its product.

The petitioner impliedly warranted the safety and fitness for human consumption of its product, which until its withdrawal constituted a concealment of the cause of action that in common equity estops the alleged defense of limitations--aside from the extensive and studied opinion of the Circuit Court below. ROTHMAN v. SILBER, 90 N. J. Super. 22, 216 A. 2d 18 (App. Div. 1966) cited by petition (p.19) stressed fraudulent concealment of the effects of the anesthetic therein. KYLE v. GREEN ACRES, 44 N. J. 100, 207 A. 2d 513 (1965) quoting that the conscience of defendant renders his conduct such that he ought not to avail himself of limitations. The omission to disclose that which became the basis of withdrawal is the gravamen of that conscience.

The breath of the case is compounded by the required application of the 4 year limitation for breach of warranty for injuries under the Uniform Commercial Code adopted by 49 states (including New Jersey), the District of Columbia, and the Virgin Islands, and a reappraisal of ERIE R.R. v. TOMPKINS, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 185 (1938) with its causative and extensive judicial erosions relegating this government to 50 countries of laws as contra-distinguished from a federation of states. Confusion and judicial discord among states in the protection of its residents and non-residents are its net product. For the State of Ohio to have a "wilful negligence" statute ruling out a passenger of New Jersey in an automobile accident in Ohio, which New Jersey refused to follow as contrary to its public policy, or for a non-resident to be bound by French or

Napoleonic law of negligence in Louisiana MISKEL v. SOUTHERN FORD, 439 F. 2d 790, 5th Cir. (1971) appears to merit a considered long overdue reappraisal for its continuance. In RADFORD v. DOWDS, U. S. Dist. Ct., No. District of Ohio (1956), deceased was sent by the Pentagon to Ohio and while a passenger in an automobile, was injured in an accident. The suit, in which the writer appeared in his behalf, was governed by the "wilful negligence" of its guest law, contrary to the New York law where he resided.

For an estimated 50,000 household and other non-oral consumer products to warn of deleterious effect and to keep out of the reach of children, following the horizons opened by the writer's case of PIZZUTO v. S.C. JOHNSON & SON, U. S. Dist. Ct. of New York, Southern District, about 1936, and yet no products for oral consumption, is prejudicial paradox.

The petition (p. 1 and 2) says its application in the Circuit Court for rehearing was denied. The petition for a rehearing was en banc and significantly Judge Rosenn, who concurred and dissented in a separate opinion below, concurred in denying a rehearing.

The petition omits FEDERAL RULES OF CIVIL PRACTICE 56(c) cited and relied upon by the Circuit Court below, cited by the District Court below, and the fundamental basis of "Questions to be presented" (p. 2 of petition) which entitled appellee to a trial by jury herein. Rule 56(c) provides:

> "* The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

REPLY TO QUESTIONS PRESENTED

Petition (p. 2) in its premise that knowledge of a cause of action by a person must under state law be decided by a judge without a jury, is inaccurate and inadequate. The case of LOPEZ v. SWYER, 62 N. J. 267, 300 A. 2d 563 (1973) relied upon by petitioner, stated that (p. 10a of appendix to petitioner's brief):

> "The determination by the judge should <u>ordinarily</u> be made at a preliminary hearing and out of the presence of the jury. (footnotes omitted. 62 N. J. at 274-75, 300 A. 2d at 567." (underscore ours)

To say that a federal court must follow such law is to abrogate Rule 56(c) entitling a litigant to a trial by jury and invokes adherence in a procedural issue to application of substantive law of a state under ERIE v. TOMPKINS, supra. The District Court, upon the argument, transcribed below in its acknowledged quandary, said there was an obligation to follow Federal "Rule 56(c) which prevents me from making factual determination on controverted facts*" rather than to follow a state procedure by the judge, and that it was aware of the fact that "it is settled

doctrine in the law to construe such motions wherever possible to preserve the constitutional right of trial by jury *".

The petition (second question) in presenting the admission that there is no state decision directly in point, that a per quod claim can be barred by the defense to the other spouse's claim, indicates that the Federal Court can hold it may not be barred under the ERIE-TOMPKINS case, supra, which ruled that the legislature or the law of the Supreme Court of the state governs. The defense that the husband's want of discovery is controlled by the wife's alleged knowledge is tenuous.

REPLY TO STATEMENT OF THE CASE.

Petition (p. 3) persists that Florence Goodman was "advised" to discontinue Oracon, and even before this Court omits that an unidentified girl who answered the doctor's telephone suggested it.

Petition (p. 4) again stated that Dr. Henry Goldbas said not to take Oracon, but omits to state that the doctor did not say that the pill caused the phlebitis. Again, petitioner omits that the doctor's hospital reference injected her long automobile trip with the phlebitis.

Petition (p. 4) again says plaintiff Florence Goodman noticed a lump on her right breast in December 1968. Petitioner omits that she had numerous lumps on her breast as early as 1964 which were benign. Again the omission that Dr. Skeets recommended, not surgery but a biopsy, and arranged for her admission on February 25, 1969. On February 27, 1969 the biopsy was the first knowledge of cancer known to man--and the complaint was filed within 2 years thereof, to wit February 25, 1971. No doctor, much less plaintiff, knew that the lump was cancerous until that biopsy. Every lump or elevation is not a cancer.

The petition fetches nil to deduct that plaintiff knew there might be a relationship between the pill and thrombophlebitis when she gave a history, including medication, to Dr. Nathan Dorman and Dr. Henry Goldbas. Besides, Dr. Dorman was a dermatologist.

Mere conference with counsel June 11, 1968 and procurement of the hospital record that she had taken Oracon and had thrombophlebitis, is no sound basis to say she knew there "might" be a cause of action. It confuses conjecture with no available expert medical opinion. The hospital record dispelled it.

The petition (p. 5) states that on or about November 28, 1969 counsel received a letter from Mr. Krim enclosing an advertisement that sounds as if it supports "my view", i.e. plaintiff's, of the pill. Mr. Krim was just an employee of a former employer and wrote, not of the pill, but that she could not take a job. By no stretch is talk or view or imagination by a plaintiff any basis for probity of medical opinion.

Petition (p. 5) refers to the deposition of Dr. Harold Schwartz taken November 22, 1974. Counsel knew, consented

thereto, and participated therein. No specificity of vagueness by Dr. Schwartz is mentioned, much less its relevance.

Petition (p. 6) again lends confusion by saying that Dr. Schwartz prescribed the pill, not for contraception but for menapausal complaints. Petitioner diverts from the inherent deleterious nature of its product when it enters the human body, be it for contraception, menapausal complaints, dermatitis, or otherwise. The product was inherently dangerous to the body and defendant omitted to warn the public of its risks.

Petition (p. 6) quoted the uncertainty of the Judge in the District Court:

> "I reach no conclusion, I don't know *".

The Circuit Court ruled that "his explanation was completely unsatisfactory*".

The petition (p. 7) quotes from the quandary of the Federal District Court Judge whether "I am permitted to do what a State Court Judge would do in this case*" Occult as it appears in his discretion, and then "If I'm not, whether, then, under Rule 56 there exists any factual controversy at all". Contrary to the plainly presented facts, particularly of Dr. Henry Goldbas--the family's treating-hospital physician--he stated as late as May 22, 1975 at her literal death door that he did not know whether the pill caused her condition; and as early as June 21, 1969 when she was hospitalized the first time, he said that she was on a long automobile

trip when her leg swelled--the thrombophlebitis. The District Court Judge completely disregarded the cancer that even under the equivocation of the New Jersey Supreme Court case of LOPEZ v. SWYER, supra, admittedly by the petitioner and the District Court was not discovered until February 27, 1969 when the St. Barnabas Medical Center laboratory did the biopsy. Obviously, Florence Goodman could not sue for an anticipated or a hopefully justified cancer. This had nothing to do with the death of Florence Goodman on May 22, 1973. Obviously she could not sue for an anticipated and correlative death.

The petition (p. 7) says the majority of the Court of Appeals, which reversed the District Court Judge, said there was at least a question as to whether the claim based on alleged thrombophlebitis noted about June 21, 1967, was a different cause of action from the cancer noted February 27, 1969--all aside from discovery of probative knowledge that either condition was caused by the pill which was first known in July 1971.

The petition (p. 7) misstated the opinion of the Circuit Court of Appeals in saying the Court ruled the husband's per quod claim was derivative. The Court said it was independent--and even if his independent damage was a right to sue deriving or emanating from her injury, his discovery date that the pill caused the thrombophlebitis and/or the cancer and/or the aggravation of the fibro-cystitis was different and the summary dismissal of his independent cause of action was error.

The rationale of LOPEZ v. SWYER, supra, on extension of limitations is discovery. The use of that very word applies to the husband's cause of action--discovery by him. To attach derivity to the husband's cause of action is a deprivation of his cause of action and due process. The term derivative lends a play on words --were it not for the spouse's injury, there would be no injury to the husband and not that a right or child dies with the parent. To deny his cause of action before he had knowledge is a deprivation of his cause of action and due process of law.

The petition (p. 7 and 8) mistook the opinion of the Circuit Court of Appeals and the District Court Judge that the District Court summarily dismissed the cause of action for the death of Florence Goodman since plaintiff's claim was time barred. Aside from the questionable logic, it is unconstitutional because an injury claim could be time barred, so could the heir's claim for a death after numerous hospital admissions more than 2 years after injestion of defendant's pill.

The petition (p. 8) comments that the Court of Appeals considered as improper the summary decision of the District Court on "late discovery" exception to the limitations statute in following the suggested administrative procedures of state court decisions. (Petitioner does not cite even one decision of the state court.)

The petition (p. 8) states that the dissenting judge in a Court of Appeals,

in partial agreement said he would have affirmed the District Court Judge as to the thrombophlebitis claim, evidently indicating that the District Court erred as to the cancer claim and the death claim.

REPLY TO PETITIONER'S REASON FOR GRANTING THE WRIT.

Petition (p. 8) stated that the Federal Court in a diversity case should disregard "federal practice" and follow state court procedure as litigants, presumably plaintiffs and defendants, would go "forum shopping" despite their constitutional right in a diversity citizenship case. Petitioner casts the aspersion to litigants as "forum shopping". The rationale of human development, a part of which forms the jurisdictional, is to seek help for a better and just way. To be relegated to harsh and narrow-minded laws at times is a difference of degree, whether civil damages or civil rights. LOPEZ v. SWYER, supra, alerts avoidance of harsh laws. To deprive a person of recovery for the loss of his limbs or death of a provider can be as touching as the right to speak, vote, pray, eat, or be entertained to the beholder. The soul here needs the body.

The reason to premise the writ is inconsistant with petitioner's statement (p. 2) where petitioner tells this Court in Questions Presented "*that there is no state court decision in point*", and ventures (p. 9) that the Appeal Court interpreted state law not consistently.

Petition (p. 10) seeks substantiation for the dissent in Judge Rosenn's opinion, to wit BYRD v. BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., 356 U. S. 525, 78 S. Ct. 893, 2 L. Ed. 2d 953 (1958). This case is different in that the issue of employment is not necessarily non-jury; that the weight of the harshness of a limitation to equitable value is non-jury under LOPEZ v. SWYER, supra, that LOPEZ avoids forum shopping, that the majority in the Circuit Court undermined ERIE-TOMPKINS and increased the "burden" of diversity cases. If diversity has become a burden, our framing fathers shopped at the wrong storehouse.

The petition (p. 9) states that the state court "established" a balance and interwoven doctrine, really an administrative procedure which is contrary to the petitioner's basis for the question. Again petitioner cited LOPEZ v. SWYER, supra. Though counsel quotes (p. 13) from this case, light or nil is made of the statement therein:

> "* It is true that the time of discovery is a question of fact and so could be left to a jury *".

This language certainly is not decisive or mandatory to a trial judge of the state court or federal court to decide without a jury, but a suggestion or view; again differing with the petition (p. 10 and LOPEZ, and LOPEZ differing with Judge Rosenn.

The petition (p. 9) quotes from the dissenting opinion of Judge Rosenn that

leads him, not in complete but "some disagreement with the majority on the disposition of the claims presented", the majority following BYRD v. BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., supra, as part of the "outgoing saga" of reconciling the command of ERIE-TOMPKINS, supra, with the purpose of federal rules and federal policies. It is incomprehensible that authors of ERIE-TOMPKINS, supra, so summarily came upon the legal horizons and envisoned that its branch Federal Circuit in Louisiana would be tied by the law of negligence in that state and puppetized to follow French or Napoleonic law. Confidence in the judicial, legislative and executive directors that general uniformity or Federalization will not squelch individuality must have been the premise of our forerunners with checks and balances, not the sovereignty of a single state law reaching out to diverse state citizens who in the chain of interstate commerce were riding or consuming--synonymous.

The petition (p. 14) interprets LOPEZ as to what plaitiff "knew or should have known" and limits it to comment or impressions which has nothing to do with the cause of action. Certainly a comment or impression by a plaintiff that is not based upon probative or admissible expert knowledge is irrelevant.

The petition (p. 15) says that a judge would understand the distinction between a position that plaintiff knew or should have known, but "a jury may not". Such presumption lends ludicrous--in depriving a citizen thereof of his constitutional

right to a trial by jury--so inherent and so universal--the foundation of a jury and so sustaining by the courts as daily bread.

Petition (p. 15) says that LOPEZ was amplified by FOX v. PASSAIC HOSPITAL, 71 N. J. 122 (1976) and MORAN v. NAPOLITANO 71 N. J. 133 (1976) which sustained the plaintiff herein. Counsel dwells on the minority opinions in the New Jersey cases that plaintiffs should be limited to a "reasonable time" after discovery and not the 2 years under the statute, really legislating not juridicating, and contrary to the majority opinion.

The petition (p. 15) blows in two opposing directions: first that in MORAN and FOX, supra, the discovery rule possesses inherent capacity for prejudice to a defendant and yet on p. 12 that "* further inquiries as to prejudice, etc. were not even relevant*"; and quotes from a footnote in FOX, supra, that as to prejudice where the cause of action is discovered after the two year period, "we leave the matter, subject to what we said in Lopez, 62 N.J. at 276, for further consideration in a case presenting that precise issue." Here the discovery took place more than 2 years so the matter would be left for further consideration.

The petition (p. 16 and 17) states that even where discovery occurred after the 2 year period, defendant may show that 2 years from that date of discovery unusual prejudice occurred. To the very date of his brief, defendant had never

alleged nor much less shown any prejudice, and much less any unusual prejudice. Further to derogate the intelligence of a jury as unable to discern "a reasonable time" in which to start a suit where prejudice is justifiably alleged and evidenced, when the universal province of a jury is to determine reasonableness as an issue, is unprecedented.

The petition (p. 17) erroneously equates issue of statute of limitation where late discovery is involved with legal issue of jurisdiction, yet cites no precedent.

The petition (p. 19) cites EKALO v. CONSTRUCTIVE SERVICE CORP. OF AMERICA, INC., 46 N. J. 82, 215 A. 2d 1 (1965) and referred to the limited claim of the wife as distinguished from the husband, who recovered for medical bills incurred by him. The Court, according to petition's paraphrase, evidently merely said the claim of both spouses should be tried at the same time. Again, no issue of difference in discovery was involved. It was the incorporation of the wife's claim for consortium for injuries to the husband.

The BYRD case, supra, cited in petition (p. 10 and 11) appears on all fours with the case at Bar and strongly sustains the appellee. Therein, defendant in a personal injury suit claimed immunity from a negligence suit under a workmen's compensation statute on the ground that the work was part of the trade, business or occupation. By statute the work

issue was for determination by the Court and not the jury. The Court held, per Brennan, J. (p. 962):

> "We find nothing to suggest that this rule was announced as an integral part of the special relationship created by the statute. Thus the requirement appears to be merely a form and mode of enforcing the immunity Guaranty Trust Co. v. York, 326 U. S. 99, 108 L. Ed. 2079, 2085, 65 S. Ct. 1464, 161 ALR 1231 and not a rule intended to be bound up with the definition of rights and obligations of the parties.
>
> "But there are affirmative countervailing considerations at work here. The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which in civil common law actions, it distributes trial functions between judge and jury, and under the influence--if not the command of the Seventh Amendment assigns the decisions of disputed questions of fact to the jury."

At page 963:

> "We think that in the circumstances of this case the federal court should not follow the state rule. It cannot be gainsaid that there is a strong federal policy against allowing state rules to disrupt the

> judge-jury relationship in the federal courts."

In the instant case we have not even the exactitude of legislative pronouncement as in BYRD, supra, but an equivocation or open invitation in verbiage in LOPEZ.

Petition (p. 10) cites in paraphrase fashion from the concurrent and dissenting discussion of Judge Rosenn, who rendered inapplicable MAGENAU v. AETNA FREIGHT LINES, INC., 360 U. S. 273, 70 S. Ct. 1184, 3 L. Ed. 2d 1224 (1959) and the BYRD case, supra. In the former, the court said there was no reason to refer the issue of "employee relationship" to a judge rather than a jury with the other issues. In the latter, the Supreme Court ruled the employer's immunity in a negligence case is not an integral part of the statutory relationship and was not a non-jury issue. LOPEZ never said that relegation of the issue of discovery is an integral part of any statute or law as the petition (p. 11) attempted to infer. To the contrary, LOPEZ keeps open the door to jury determination. The petition (p. 11) stoutly confirms the sacredness of the trial by jury by the Supreme Court of New Jersey as a "mandate" to preserve it.

The Court, at p. 1228, repeating the BYRD case, supra, said:

> "As we said in that case 'an essential characteristic of (the federal system) is the manner in which, in civil common law actions, it distri-

butes trial functions between judge and jury' (assigning) the decisions of disputed questions of fact to the jury. Byrd v. Blue Ridge Electric Coop. Inc., supra (356 U.S. at 537) We found that the South Carolina rule in compensation cases, permitting courts to decide such factual issues without the aid of juries, was not 'announced as an integral part of the special relationship created by the statute'. Id 356 U.S. at 536. We held that under such circumstances 'the federal rule should not follow the state rule'. Id 356 U.S. at 538. The same reasoning applies here."

The MAGENAU and BYRD cases sustain appellee. They had a definitive rule or practice to keep out juries on certain issues and yet the Supreme Court disregarded same and upheld the right to a jury trial. In LOPEZ there was no definitive rule or practice and no ingredient of integrality.

In COLACURCIO CONTRACTING CORP. v. WEISS, 20 N. J. 258, 119 A. 2d 449 (1955) cited in petition (p. 11) a jury trial was had, a verdict rendered and set aside as against the weight of evidence. The Court held that the trial judge has such authority which does not affect the right to trial by jury. The Court, coincidentally Mr. Justice William J. Brennan, stated at p. 265:

> "* that the appellate court on such review shall give 'due regard to the opportunity of the trial court and the jury to pass upon the credibility of the witnesses' *".

Thus the rule in New Jersey is that credibility issues belong to judge and jury, not to judge alone, sustaining the appellee.

Petition (p. 10 and 11) cites ERIE-TOMPKINS, supra, charging the Circuit Court is undermining its basic philosophy, yet omits to depict the basis for its charge. The ERIE case states that the law of the state concerned is to be followed, to wit legislative enactment, and the law enunciated by its highest court. Neither condition is complied with. The petition (p. 2) in Question 2, admits "there is no state decision directly in point *", and as to question 1, no decision in New Jersey has stated that the trial judge must decide the issue of discovery.

Petition (p. 9, 10, 12, 15-17, 19) cites LOPEZ v. SWYER, supra. Therein, in 1962, plaintiff had a radical mastectomy for breast cancer and defendant radiologist treated her until February 1962. Burns and pain occurred. In March 1967 plaintiff overheard a physician state that defendant placed plaintiff on a table and went out for coffee and "there you see, gentlemen, what happens". Suit was started September 1967. Reversal of summary judgment was affirmed. The Court said, Mountain, J., at p. 273:

> "Like so many other equitable doc-

trines, it has appeared and is developing as a means of mitigating the often harsh and unjust results which flow from a rigid and automatic adherence to a strict rule of law."

The Court (p. 274) in an expounding non-decisive manner thought that the trial judge "can better" reconcile the respective equitable claims of opposing parties and gave a general non-exclusive view that "ordinarily" the determination should be made by the judge at a preliminary hearing.

The petition (p. 12) cites HEAVNER v. UNIROYAL, INC., 63 N. J. 130, 305 A. 2d 412 (1973) that N.J.S.A. 2A:14-2 (p. 3) which states the limitations are 2 years next after the cause of action accrued. Heavner in fact says (p. 18):

"It was well settled that in an action for personal injuries, the two year statute, computed from the date of occurrence of the injuries (or in some situations the date of their discovery), would govern*" (underscore ours).

Therein residents of North Carolina sued in New Jersey the manufacturer (Uniroyal) and seller (Pullman) of a tire that exploded causing injury in North Carolina. Uniroyal was a New Jersey corporation and Pullman was a Delaware corporation. Both defendants did business across the nation. The Supreme Court of New Jersey were "assuming the action at bar against both

manufacturer and retailer can properly be considered as one for breach of a 'contract for sale' within the intendment of that section." The Court said:

"In other words, the four-year provision of section 2-725 is to apply only to non-personal injury claims otherwise within the scope of the chapter."

A blight on our book to dismiss a litigant seeking our shore for better rights or civil relief in calamitous cases as forum shoppers or bargainers. SWIFT v. TYSON, 16 Peter 1, 10 L. Ed. 865 (1842) may have swiftly granted overseer-like federal relief and not delegate the dispair of ERIE-TOMPKINS. This is the more surprising when the manufacturer of the exploding tire had technical, legal or corporate ties in New Jersey.

The petition (p. 15-17) cites FOX v. PASSAIC GENERAL HOSPITAL, 71 N. J. 122 (1976). This case clearly sustains appellee. Moreover it was never alleged, much less evidenced, that petitioner was "peculiarly or unusually prejducied" by the filing of the suit within 2 years of discovery of the cancer, aside from the later knowledge (to wit, 5 months) of correlationship, which appellee under LOPEX had the right to rely upon. In the FOX case, a drain in plaintiff's abdomen was discovered in surgery on March 2, 1971 left during prior surgery. Suit was filed December 1, 1972. The court used the term "equitable approach" to the bar of limitation, following LOPEZ v. SWYER.

The Court could well have meant an approach of justice or fairness and avoid an ambiguous encroachment on an antiquated system of equity long abolished as if two systems existed, law and equity Mysteriously, juries never wore with the equity branch. Justice and fairness are at work where a litigant has no knowledge of the existance of the cause of action. The Court said (p. 5):

> "It is convenient as well as logical to take the position that since the causes of action does not accrue until discovery thereof, under the rationale of the discovery principle Fernandi v. Strully, 35 N. J. 434, 450 (1961) the plaintiff should normally have the benefit of the legislative policy determination that he institute his action at any time within two years of strict accrual." (underscore ours).

The petition (p. 17) fortuitously injects that it would be too taxing for a jury to determine burder of proof in different causes of action. The function of a jury is and has been to determine the burden of proof or evidence.

The petition (p. 19) cites MORAN v. NAPOLITANO, 71 N. J. 133 (1976). Therein basicly defendant treated plaintiff for a chronic ulcerated colitis on September 21 1971. In December 1972 a physician assessed the treatment as malpractice. On Jan. 9, 1974 plaintiff sued. Defendant moved for summary judgment contending the suit was not filed timely. The Court af-

firmed judgment denying summary judgment and said (p. 134):

> "Of the two basic issues presented on this appeal, our opinion in Fox, supra, is determinative of one."
>
> "We then held that notwithstanding that plaintiff discovered his cause of action for malpractice prior to the expiration of two years from the date of the actionable conduct, he nevertheless will ordinarily be allowed two full years from the date of such discovery to bring his action."

Petition (p. 7) cites APPELT v. WHITTY 286 F. 2d 135 (7 Cir. 1961). Therein a suit was brought against an Illinois resident for injuries in an automobile accident by plaintiff as next friend of an injured minor. A motion to dismiss for lack of diversity was made. The court held that disputed issues of jurisdictional facts may be heard and determined by the Trial Court. His deposition abundantly showed he was emancipated and that his domicil was Chicago. There were no issues of credibility or subject of demeanor for a jury. Jurisdictional issues are matters within the law realm.

GILBERT v. DAVID, 235 U.S. 561, 35 S. Ct. 164, 59 L. Ed. 360 (1915), cited in petition (p. 17) that since a court determines jurisdiction of the court on place of citizenship, it should determine issues of fact in discovery of a cause of action. The deduction on its face is far

fetched. Therein the Supreme Court stated that it was discretionary with the trial judge to submit the issue to the jury. The Court said, at p. 363:

> "But while the court might have submitted the question to the jury, it was not bound to do so; *"

BEACON THEATRES, INC. v. WESTOVER, 359 U. S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959) which petition cites (p. 18) that there is nothing inconsistent with federal practice in having issues tried by a judge without a jury. Therein a mandamus was sought to require a District Court Judge to vacate orders alleged to deprive of a jury trial of issues. Fox had a contract to show first run films in an area for a period of time to lapse before they were shown elsewhere. The issue of competition between theatres was a jury question. The entire tenor of the decision was to protect the right to trial by jury. The Court said, Burton, J. (p. 997):

> "The Declaratory Judgment Act and the Federal Rules 'necessarily affects the scope of equity * This is not only in accord with the spirit of the Rules and the Act * but is required by the provisions in the rules that' the right to trial by jury as declared by the Seventh Amendment to the Constitution or as given by a Statute of the United States shall be perserved...inviolate."

The petition (p. 18) cites COLGROVE v.

BATTIN, 413 U. S. 149, 93 S. Ct. 2448, 37 L. Ed. 2d 522 (1973) to support the bland position that a jury trial need not protect as to everything, only issues that are jury issues. Nowhere in the decision is there any support for this carefree phrase. To the contrary it strongly sustains plaintiff. Therein, the plaintiff sought relief from a rule that limited jury trials to 6 persons, contending right to a jury of 12 persons. The defendant never said plaintiff was not entitled to a jury trial, but to one with lesser persons. The Court said, per Brennan, J. (p. 529):

> "Keeping in mind the purpose of the jury trial * in criminal and civil cases, to assure a fair and equitable resolution of factual issues * In Williams, we rejected the motion that the reliability of the jury as a fact finder...(i.e. a function of its size. *"

The issue of knowledge of a cause of action is not only a jury issue, protected by the Seventh Amendment, but preserved by 56 F.R.C.P.

Petition (p. 18) cites GUARANTY TRUST CO. v. YORK, 326 U. S. 99, 65 S. Ct. 1464 89 L. Ed. 2079 (1942). Therein action was instituted by a non-acceptance note holder against the trustee in the equity side of the district court where jurisdiction was based on diversity of citizenship. The application of the state statute of limitations was in issue. The Court, Frankfurter, J., said (p. 2084):

> "This does not mean that whatever equitable remedy is available in a State court must be available in a diversity court suit in a federal court, or conversely that a federal court may not afford an equitable remedy not available in a state court. Equitable relief in a federal court is of course subject to restrictions; the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery, * a plain adequate and complete remedy at law must be wanting * the constitutional right to trial by jury cannot be evaded * " (underscore ours).

Therein, the Court reversed and remanded. The District Court found for defendant and the Circuit Court reversed. The aforesaid appears as an early erosion of ERIE-TOMPKINS, supra.

RAGAN v. MERCHANTS TRANSFER & WAREHOUSE CO., 337 U.S. 530, 69 S. Ct. 1233, 93 L. Ed. 1520 (1949) is cited in petition (p. 18). Therein the court held the service was an integral part of the statute. That feature makes the case at Bar different because there is no issue of integrality. This case, as pointed out in the reply brief below, has come an adverse "talk of the town" case and is so regarded in PRASHER v. VOLKSWAGEN OF AMERICA, INC., 480 F. 2d 947 (1973), 8th Cir., So. Dakota, wherein the complaint was sustained by the filing of the suit, thus tolling the statute, despite the South Dakota's statute which required service for commencement of the cause.

The Court said (p. 950):

> "Some courts have taken umbrage in the Hanna language to believe that Ragan was overruled. Other courts such as our own have disagreed and under circumstances on all fours with Ragan, have reluctantly felt compelled to apply the law of Ragan. Undoubtedly the total dismissal of Ragan would not sadden anyone--perhaps only because of the harshness of the rule to the individual case. * The Supreme Court, although perhaps tenuously in the eyes of many, still sought to distinguish Ragan in Hanna. The Court made direct reference to the fact that Ragan did not involve a federal rule and broad as the state rule with which it purportedly clashed, 380 U. S. at 470, 85 S. Ct. 1136 and the Court additionally observed the following Rule 4(d)(1) did not involve, as it did in Ragan a situation where application of the state rule would wholly bar recovery *".

In juridical annals, the superlative is reached that no one would be saddened by the scrapping of Ragan.

HANNA v. PLUMER, 380 U. S. 460, 14 L. Ed. 8, 85 S. Ct. 1136 (1965) presented a direct conflict between Federal Rule of Civil Procedure 4 (d)(1) and a state law governing service of process. The Court therein, Warren, J., overtly said (p. 16):

> "The Erie rule has never been invoked to void a Federal Rule * "

and at p. 18:

> "The purpose of the Erie doctrine, even as extended in York and Ragan, was never to bottle up federal courts with 'outcome determinative' and integral relations stoppers where there are affirmative countervailing (federal) considerations and where there is a Congressional mandate (the Rules) supported by constitutional authority."

And Harlan, J., concurring (at p. 20), questioned the goodness of Ragan:

> "* particularly Ragan, which if still good law * I think the decision was wrong *".

and at p. 18:

> "To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state created rights, would be to disembowel either the Constitution's grant of power over federal procedure, or Congress' attempt to exercise that power in the Enabling Act. Rule 4(d)(1) is valid and controls the instant case.
>
> "So Rule 56 of the Rules of Civil Practice is not to cease to function to enable a state judicially suggested inconclusive procedure to do its disembowelment". (underscore ours

The petition (p. 18) cites the case of

RICHARDS v. UNITED STATES, 369 U.S. 1, 82 S. Ct. 585, 7 L. Ed. 2d 492 (1962) to indicate the extent the federal court would look to local law in applying a state statute of limitations. The case is inapposite. No issue of state statute of limitations was involved. Therein suit was for a death by airplane traveling from Oklahoma to New York, which occurred in Missouri. The Missouri Death Act limits recovery to $15,000.00. The Court followed the death act of Missouri.

The petition (p. 18) cites ROSS v. BERNHARD, 396 U.S. 531, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970) for the proposition that there is nothing inconsistent with federal practice in requiring the equitable issue of discovery to be tried by a judge alone. The case is not in point. There is no limitations issue involved. The Court in fact stressed the derivative right of the stockholders to the jury trial of the corporation. The case sustains appellee. Therein, the Court said White, J. (p. 736):

> "The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action."

The petition (p. 18) cites United States v. Matlock, 415 U. S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974), which case is inapplicable. It deals with evidence as a basis for consent to a warrantless search at a suppression hearing --a procedural matter. In the instant case, we have an issue of knowledge, the

time of which governs the continuance of a cause of action. Knowledge of a cause of action is a salient ingredient of the cause of action.

UNITED STATES v. YELLOW CAB CO., 340 U. S. 543, 71 S. Ct. 399, 95 L. Ed. 523 (1951) is cited by the petition (p. 18). The petitioner states that there is nothing inconsistent with federal practice that equitable issue raised by delayed discovery be decided by a judge without a jury. The petition completely ignores Rule 56, F.R.C.P. which protects a litigant's right to a jury trial. Therein a suit was brought for injuries against the defendant taxicab company, whose vehicle was in collision with a U. S. mail truck. The company impleaded the U. S. Government, under the Federal Tort Claims Act, which requires claims to be tried without a jury. The Court said that although the plaintiff had the right to a jury trial as to the company, there could be separate trials. This case is inapposite because the appellee has a right to trial by jury of the issue of discovery of the causes of action.

The Uniform Commercial Code to promote uniformity is national in scope and provides for a 4 year limitation for breach of warranty for damages, including injury. Appellee sued in warranty and negligence. The application of the 4 year limitations renders the warranty cause timely regardless of discovery. The decision of the New Jersey Court, HEAVNER v. UNIROYAL, supra, wherein the Court dismissed the residents of North Carolina, returning

them to no relief, obiter dicta in limiting breach of warranty for personal injury to 2 years, is a threat to the goal of uniformity. The Supreme Court should follow the code and direct the 4 year limitation. In HANNA v. PLUMMER, supra, the Supreme Court stepped in when there was a threat to the goal of uniformity.

Anomalous, arbitrary and unconstitutional it would be that the litigant has a 4 year limitation to recover damages for breach of warranty for a defect in the product, and yet is confined to a 2 year limitation for damages for injuries due to the same defect.

UNIFORM COMMERCIAL CODE, White Summers Hornbook Series, at p. 4, reports:

> "By 1968 the Code was effective in forty-nine states, the District of Columbia and the Virgin Islands. Section 2-725 of the Code provides:
>
> "(a)n action for breach of any contract for sale must be commenced within four years after the cause of action accrued."

The discovery of the correlation of fibro cystitis of decedent resulting in partial amputation of the left breast took place November 22, 1974 when Dr. Harold Schwartz, the prescribing physician, stated in a deposition that the defendant's product aggravated that condition, and renders the claim for it as timely.

The petition (p. 19) cites ARUTA v.

KELLER, 134 N. J. Super. 522, 342 A. 2d 231 (App. Div. 1975). Therein plaintiff sued for injuries sustained on a machine. The wife sued for loss of consortium. Although the court sustained the amendment subsequent to the statute as to the proper party to be used, the issue here was not there, to wit a difference in knowledge between the spouses.

The petition (p. 11) claims that the Circuit Court increases the number of diversity cases in federal court, causing a burden. The framers of the constitution, did not allow the "burden" of diversity to prevent its protection. The case of EKALO v. CONSTRUCTIVE SERVICE CORP. OF AMERICA, 46 N.J. 82 at p. 94 quoted approvingly from FALZONE v. BUSCH, 45 N.J. 599 (1965):

> "* the fear of an expansion of litigation should not deter courts from granting relief in meritorious cases."

The case of KIMPEL v. MOON, 113 N.J.L. 220, 174 A. 209 (Sup. Ct. 1934), cited by the petition (p. 19) sustained plaintiff. Therein the court said (p. 222):

> "* A husband who sues for loss of consortium sues, not in his wife's right, but <u>in his own</u> *". (underscore ours.

The petition (p. 19) cites KNUTSEN v. BROWN, 96 N.J. Super. 229, 232 A. 2d 833 (App. Div. 1967). Therein the plaintiff

Rita Knutsen sued for injuries sustained in an automobile accident, wherein the vehicle was driven by her husband. Suit was later brought for medical malpractice, the parents suing per quod. The case does not involve a spouse's per quod. Nevertheless the per quod was dismissed as untimely, yet the infant's case continued.

PATUSCO v. PRINCE MACARONI, INC., 50 N. J. 365, 235 A. 2d 465 (1967) cited in petition (p. 19) sustains the opinion of the court below that the per quod claim is independent. Therein, the Court stated (Weintraub, C.J.) at p. 368:

> "The law recognizes a man's relational interest in his wife and gives him a cause of action against one who negligently involves that interest. <u>Although the husband's consortium claim is thus distinct</u> from the wife's, it will fall if the wife was contributorily negligent." (underscore ours)

and again at p. 372:

> "Although the subject is not discussed in their authorities, we think it implicit that where the wife is thus permitted to sue for her medical, past or future, the husband's contributory negligence would not bar her."

Petition (p. 19) cites ROST v. BOARD OF EDUCATION OF FAIR LAWN, 137 N. J. Super 76 (in error cited as 79), 347 A.

2d 811 (App. Div. 1975). This case does not serve petitioner. Therein, the father joined in his per quod claim with his son for injuries to the son. The statute lends the same time to file a notice of claim to both. The case lacks the feature herein of a difference in knowledge of the cause of action.

ROTHMAN v. SILBER, 90 N. J. Super 22, 216 A. 2d 18 (App. Div. 1966) is cited in petition (p. 19). Therein the plaintiff wife received an anesthesia which caused stiffness and pain. The Court, at p. 33, stated in support of denials of summary judgment:

> "4,5 Proceedings for summary judgment under R.R. 4:58 (while they) are not to be used as a vehicle for the trial of disputed facts upon affidavit * to the end that all doubts are to be resolved in favor of the opponent of the motion *".

There was no evident set of different facts as to the spouse's respective knowledge as herein.

Petition (p. 19) cites SCOTT v. RICHSTEIN, 129 N.J. Super. 516, 324 A. 2d 106 (Law Div. 1974) which lends no aid to petitioner. It merely states that since the action for loss of consortium is derivative, there is more logic in bringing the suit under a single complaint than where there are separate injury claims. The independence of the spouse's claim per quod is maintained. It merely stems from the same injury.

TACKLING v. CHRYSLER CORP., 77 N. J. Super. 12, 185 A. 2d 238 (Law Div. 1962) cited in petition (p. 19) is in agreement with the Circuit Court that there is no specific New Jersey authority on discovery and per quod claim of the husband. The petition says it pays to be indifferent or ignorant. There is no proof of indifference. The petition would penalize a spouse for lack of knowledge, whereas LOPEZ v. SWYER, supra, as its basis rules that lack of knowledge tolls limitations statute. Therein, the wife sued for injuries sustained when the wheel fell off a new car which she operated. Her husband sued per quod. The husband evidently learned of the wheel incident when the wife was injured. The husband in the case at bar did not have comparable knowledge. The Court therein merely stated the period of limitation statute is the same.

The petition says (p. 18) that the Circuit Court fashioned a new rule as to the husband's independent per quod claim by a separate discovery. The discovery was differently timed. To predicate his cause of action, not on his knowledge, but on her knowledge, is a deprivation of due process.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM R. MORRIS
Counsel for Appellee
744 Broad Street
Newark, N. J. 07102

(Appendices Follow)

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Public Health Service
Food and Drug Administration
Rockville, Maryland 20852

May 5, 1976

Mr. William R. Morris, Attorney
744 Broad Street
Newark, New Jersey 07102

Dear Mr. Morris:

This is in reply to your letter dated April 15, 1976, regarding the withdrawal of sequential oral contraceptives from the market.

We have enclosed a FDA Talk Paper dated December 22, 1975 and a news release dated February 26, 1976, concerning the sequential oral contraceptives. As mentioned in the press release paper the sequential oral contraceptives were withdrawn from the market by the manufacturer because of three serious potential risks associated with the use of these products:

1. A higher potential risk of thromboembolic phenomena because of the high content of estrogen used reopposed in most of the drug administration cycle.

2. The higher risk of morbidity and mortality from a higher pregnancy rate with sequential products compared to most combination oral contraceptives.

3. The higher potential risk of adenocarcinoma of the endometrium in patients receiving sequential prod-

ducts as suggested by Silverberg and Makowski (copy enclosed) in their collection of cases.

There has been no substantial evidence based on adequate and well-controlled studies submitted to the Food and Drug Administration identifying a patient population to which the use of the sequential oral contraceptive is justified in view of the above cumulative potential risks.

We have also enclosed a copy of the statement by Alexander M. Schmidt, M.D., Commissioner of Food and Drug Administration, before the Subcommittee on Health, et. al., United States Senate on January 21, 1976, in which the sequentials are discussed on page 9. At this time the order regarding the withdrawal, and a notice of withdrawal of approvals of the New Drug Applications has not yet issued.

If we can be of further assistance, please let us know.

Sincerely yours,

/signed/
Harold C. Krema
Consumer Safety Officer
Division of Metabolism
and Endocrine Drug
Products
Bureau of Drugs

Enclosures

NEWS (SEAL) NEWS

U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

76-8 (Food and Drug Administration)
FOR IMMEDIATE RELASE PINES (201) 443-3285
February 26, 1976 (Home) (202) 363-4104

The Food and Drug Administration (FDA) announced today that all three U.S. manufacturers of sequential birth control pills have notified the FDA they are discontinuing marketing of these products.

It is estimated that 5-10 percent of the 10 million women taking birth control pills in the United States are taking sequentials.

The products to be withdrawn from the market are: Oracon, made by Mead-Johnson and Co., Evansville, Indiana; Ortho-Novum SQ, made by Ortho Pharmaceuticals, Raritan, New Jersey; and Norquens, made by Syntex Laboratories, Palo Alto, California.

Alexander M. Schmidt, M.D., Commissioner of Food and Drugs, said: "We asked the makers of sequentials to withdraw their products because they pose an unnecessary potential risk compared with other marketed birth control pills. I believe the companies have acted responsibly in voluntarily taking the withdrawl actions."

"Women who are taking sequentials should finish out their cycles and contact their physicians for a prescription for a different birth control pill, or select another method of contraception," Dr. Schmidt said.

Sequential birth control pills contain an estrogen alone for most of the pill-taking cycle, and an estrogen and progestin for the remaining part of the cycle. The other birth control pills, known as "combination" pills, combine estrogen and progestin for the entire three-week cycle.

FDA decided that sequentials should be removed from the market after concluding:

(1) They are somewhat less effective that combination birth control pills.

(2) They are associated with a higher risk of blood clotting than the combination pills.

(3) They appear to have the potential for a higher risk of cancer of the uterus than the combination pills.

In late December, FDA asked the three U.S. manufacturers of sequentials to submit information identifying which women were likely to benefit from taking sequentials compared to the combination pills. All three companies submitted data but did not prove to FDA's satisfaction that the sequentials meet a unique requirement for any group of women.

FDA last week informed the companies of its conclusion and asked that the products be withdrawn. The three companies then notified FDA they will take the voluntary withdrawal action.

FDA intends to notify physicians of the action through its FDA DRUG BULLETIN. FDA did not ask the companies to recall existing stock because there is only about two months supply of sequentials on the market.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-174

MEAD JOHNSON & COMPANY,
Petitioner,

vs.

ROBERT J. GOODMAN, individually and as Executor of the Estate of FLORENCE L. GOODMAN, deceased,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner briefly replies to the brief filed by the respondent in this matter in opposition to the petition for a writ of certiorari.

Respondent's counsel in his brief, characteristically, quotes short sentences from the opinion in *Lopez* v. *Swyer*, 52 N.J. 267, 300 A2d 563 [1973] without reference to the

surrounding language and footnotes. Footnote 3 to the opinion, which refers to the single sentence quoted by respondent at page 4 of his brief makes clear that the discovery issue is for a judge even though he may in an appropriate case go forward with the trial before ruling on the limitations defense. Counsel's quotation at page 11 is misleading because it is in the middle of a paragraph which sets forth succinctly why the discovery issues are to be decided by a judge.

The carefully reasoned decision intertwining the liberalization of limitations restrictions with an equitable determination by a judge is reflected in the opinion and footnotes in *Lopez,* supra, and in *Fox* v. *Passaic General Hospital,* 71 N.J. 122, 363 A2d 341 [1976]; *Moran* v. *Napolitano,* 71 N.J. 133, 363 A2d 346 [1976].

There is nothing in federal court practice which is inconsistent with or contrary to the procedure set forth in *Lopez,* supra. Nothing prevents the federal courts, carrying out the mandate of state law in a diversity case, from following the procedure adopted by the trial judge in this case. See Rule 39 (a), 42 (b), 52 (a).

Objection is also made to respondent's appendix which consists of a letter and a copy of a news release. Neither document is evidentiary and neither is a part of the record of the case. The news release deals with the use of "Oracon" as an oral contraceptive. There is no dispute that during the brief period the product was used by Mrs. Goodman, it was not for oral contraception, the use for which it was manufactured. It was prescribed by Mrs. Goodman's physician who selected this pill as medication because it had estrogen, not because it was an oral contraceptive.

The manner in which these documents are appended is not authorized by the Rules of this Court. Rules 24, 39 and 36. They should be stricken.

Respectfully submitted,

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10 Grand Ave., P.O. Box 470
Englewood, N. J. 07631